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THE
P R A C T I C E
OF THE
C O U R T S
OF
King's Bench and Common Pleas.

ORIGINALLY COMPILED
By **GEORGE CROMPTON, Esq.**

REVISED, CORRECTED, AND NEWLY ARRANGED,
By **BAKER JOHN SELLON,**
SERJEANT AT LAW.

THE SECOND EDITION,
WITH THE
Addition of the MODERN CASES to the PRESENT TIME, and
a PRACTICAL TREATISE ON the Mode of PASSING FINES
and SUFFERING RECOVERIES.

IN TWO VOLUMES.
VOL. I.

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PRACTICE

OF THE

COURTS

OF

CRIMINAL AND COMMON LAW

ORIGINALS CONTAINED

BY GEORGE CROMPTON, ESQ.

REVISED, CORRECTED, AND REPRINTED

BY BARTON SELLON

AT LAW

THE SECOND EDITION

Added to the original text is the present practice
of the courts, and the mode of pleading, and
the forms of writs, and other matters
of importance.



IN THE

VOL. I.

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P R E F A C E.

THE following pages are, in a great measure, composed of the materials of a work formerly compiled by the late Mr. Crompton; some part of which still retains nearly its original shape (as the Historical Introduction, the Proceedings in Real Actions, and a few other heads which have been but little affected by modern decisions); but the greatest portion hath been new-modelled and materially altered, and the whole considerably enlarged.

The intent of a Book of Practice is to point out the different modes of commencing and prosecuting suits; now these modes are governed by the *nature* of the *action* and the *situation* of the *parties* concerned. For an action may be either a *common personal* action, brought by and against common persons, that is to say, such as sue and are sued in their own right, and who are in no respect privileged; or it may be a particular *kind* of action, or the parties concerned may sue or be sued in some relative capacity and not in their own right, or they may be entitled to some peculiar privilege.

This distinction forms the general division of the work into, first, *The Mode of Proceeding in all COMMON Cases*, where the action is a common personal action, and brought by and against common persons: and, secondly, *The Mode of Proceeding in PARTICULAR Cases*; namely, either where the action is brought by or against particular persons, as peers, members of parliament, attornies, prisoners, infants, paupers, and the like; or where the action itself is of a particular kind, such as ejectment, replevin, penal actions, and also all real actions. The First

Volume treats of the proceedings in all *common* cases:—and the proceedings in *particular* cases, together with some detached heads of Practice, as Amendment, Discontinuance, Error, Costs, together with the mode of passing Fines and suffering Recoveries, form the contents of the Second Volume.

Again, when an action is brought, certain process issues to compel the party's appearance in court, to answer the plaintiff's charge; which process varies according as the defendant is to be arrested or not. The Editor, therefore, in order to render this part of the subject clear and intelligible, has first fully pointed out in what cases Special Bail may or may not be required, and has then proceeded to explain the process or means of compelling the defendant's appearance, first in actions not bailable, and next in bailable actions, treating of the practice in both cases separately and distinctly until the *Declaration*; at which period, the parties being once in court, the distinction which before prevailed in a great measure ceases, and the future proceedings may with propriety be considered under one head.

There are also certain peculiarities attending the work, which may be found not ill adapted to the purpose for which it was designed; namely, as an useful Common-place Book. All the practical directions, shewing *what* is to be done, *how*, *when*, and *where*, which may be termed the mere routine of business, are printed, for distinction's sake, in *Italics*, so that the Practitioner may at one glance discover how to proceed. The adjudged cases immediately applicable to each stage of the cause are afterwards arranged in due order, serving as a *comment* upon the *text*. The work is also divided into Chapters, and the Chapters subdivided into Sections and distinct heads, to which *letters* are annexed as marks of reference, upon the principle adopted in *Comyns's Digest*. To the cases cited, not only the

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name of the reporter but of the case itself is generally subjoined. Whenever, therefore, any *dictum* or assertion stands unsupported by authority, the Reader is advised to pay no more attention to it than he thinks it merits. The grand objects of the Editor throughout the work have been System and Method.

Such is the general division, and the plan of this Book of Practice, which has hitherto appeared in detached parts, as time and opportunity would permit; but now, being completed, assumes a more regular form. The favourable Reception of the First Edition is perhaps the best apology which can be offered for the publication of the Second.

BOSWELL-COURT,
October 1, 1798.

B. J. S.

PREFACE

It is a pleasure to have this book published, and I hope it will be of some use to the student of the history of the United States. The book is written for the student, and is intended to be a guide to the study of the subject. It is not a history, but a guide to the history. It is written in a simple and straightforward manner, and is intended to be a guide to the study of the subject. It is not a history, but a guide to the history. It is written in a simple and straightforward manner, and is intended to be a guide to the study of the subject.

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- SEC. 4. *Of the Arrest in Civil Actions.*
- SEC. 5. *Of Bail; and of the Difference between Common and Special Bail.*
- SEC. 6. *Of the ancient Mode of pleading and trying Causes, and the Alteration therein; and of the Origin of Trials at Nisi Prius.*
- SEC. 7. *Of the different Ways in which Actions may now be brought in the Courts of King's Bench and Common Pleas.*

SECTION I.

History of the Origin and Jurisdiction of the respective Courts.

THE darkness and obscurity in which the history of the remoter ages of antiquity is hidden, render it difficult to obtain any clear or accurate account of the legal polity of the ancient Britons, or of those nations that from time to time made inroads upon and settled among them.

Decennaries.

Hundreds.

Counties.

How each governed.

Of the state of towns at that time.

Laws, how made.

Jurisdiction of decennaries.

Of the county-courts.

View of frank-pledge, what.

But in the reign of the great and illustrious Alfred, the light of information breaks in upon us; and we find that upon his succession to the monarchy of England, founded by his grandfather Egbert, the constitution of the country was entirely new-modelled, and the whole kingdom reduced under one regular and gradual subordination of government, wherein every man was answerable to his immediate superior for his own conduct and that of his neighbours. By his establishment the people were classed in *decennaries*, consisting of ten families each, who were reciprocally the pledges and compurgators of each other. Ten of these *decennaries* made up the larger division of an *hundred*, and an indefinite number of these hundreds composed the still larger division of a *county*. Over every class of people presided the most discreet and able amongst them. Over the county were the alderman, (who, after the *Danish* invasion and conquest, was denominated the earl,) bishop, sheriff, and coroner. Over the hundred, the lord; and over every tything, the tythingman or borsholder. In the few miserable towns in which there was any trade, the people were, in all probability, under some species of corporate government, of the nature of which we are little informed. Writers, describing the progress of society, apprehend that some such government existed in them; but say, that it was under absurd regulations, built on oppressive notions, and tending rather to curb than assist the spirit of industry and commerce. And so well indeed are they convinced of this fact, that they assign it as one of the principal causes, that prevented towns in *England*, as well as in other parts of *Europe*, from emerging out of the despicable state they continued in till the dawn of the fifteenth century.

The laws at this time were few and simple, made at the general assembly of the state when convened by the sovereign, and promulged to the people by the earls and sheriffs in their perambulations through their several counties, in order to array and class the people within them. Matters of debt and contract were usually adjusted in the *decennaries*, but the principal causes came into the great county-court, held by the sheriff, who was assisted by the bishop and earl; which court had cognizance, First, Of offences against religion: Secondly, Of temporal offences which concerned the public, as felonies, breaches of the peace, nuisances, and the like: Thirdly, Of civil actions, as titles to land, and suits upon debt or contract. Besides which, it also held the view of *frank-pledge*; an inquest impannelled by the sheriff, to see that every one above the age of twelve years had entered into some tything and taken the oath of allegiance. From the time of king Edgar,

Edgar, this great county-court was divided into two; the one a *criminal*, the other a *civil* court. The criminal was called the sheriff's tourn, and was held by the sheriff and bishop twice in the year in the months following *Easter* and *Michaelmas*, for the purpose of trying all criminal matters whatever; from this was afterwards derived the court-leet. The civil court retained the name of the county-court, (from which came the court-baron,) and in it all the civil pleas of consequence arising in the county were discussed and decided. In the criminal court, offences were inquired of by an inquest impannelled, and offenders were punished according to the superstition of the times; if they did not purge themselves of the matter wherewith they were charged by the *ordeal*, by the *corfined* or morsel of execration, or by wager of law with compurgators. In the civil court parties complained against might purge themselves by their sureties by wager of law. Trial by *jury* was also frequently used; for that mode of trial is undoubtedly of *Saxon* origin; though whether such jury was composed only of twelve men, or whether they were bound to a strict unanimity is not precisely known at this distance of time.

Great advantages attended the establishment of these tribunals. The people were not drawn away from their domestic avocations, to attend causes at a great distance from home; due order was observed throughout the kingdom, the public peace secured, and justice administered to every one in an easy and expeditious manner by the intervention and suffrages of his neighbours. But in case a party conceived himself to be aggrieved by the judgment, or by favour or affection shewn at the trial of the cause, there lay an appeal to the king in his supreme court, or general assembly of the state, called the *Wittenagemote*; which was convened annually, or oftener, where the sovereign pleased, to consult on public business, and to try great offenders, and which, in short, had a supreme and universal jurisdiction. To this supreme court, as the nation emerged from its state of barbarism, and civilization put men on different pursuits, whereby litigations increased, appeals became frequent; so that the intervention of the *Wittenagemote*, to settle the various claims and pretensions to property, and reconcile differences, at length grew necessary in almost every case. But, notwithstanding the exercise of this *appellant* jurisdiction must have taken up a considerable share of the time allotted for the sitting of this great assembly, it does not appear that there was any other tribunal erected for the hearing and investigation of appeals from the inferior courts. Such was the nature of the jurisprudence of the country till the time of the Conquest. For

Division of county-court into criminal and civil court.

Origin of court-leet and court-baron.

Of the ordeal, corfined, or wager of law.

Trial by jury.

Advantages of the above tribunals.

Of the court of appeal.

The Wittenagemote.

Appeals to it became frequent.

Such the state of things till the Conquest.

although the *Anglo-Saxon* constitution received many severe shocks from the irruptions of the Danes and other nations, and many new laws and customs were introduced by the several invaders; yet so excellent was the outline of the government, as sketched by the masterly hand of king *Alfred*, that through the various revolutions, neither the provincial nor judicial polity of it were discontinued or materially altered. It is certain, however, that the whole race of our *Saxon princes*, on their accession to the throne, with the advice of their great council, made such alterations in the laws as the exigencies of the times might require.

Alteration by
the Conqueror.

Introduction of
the feudal sys-
tem amongst his
followers.

Law thereby
became intri-
cate.

General esta-
blishment of
the feudal
system.

Nature of it.

Consequences
thereof upon
the business in
inferior courts.

But when the *Conqueror*, by the decisive advantage he gained over *Harold* at *Hastings*, got possession of the crown, he put in force the old *Saxon* law, by which the estates of all persons were forfeited, who were found in arms in opposition to their sovereign. These he divided amongst his followers and favourites, to hold of him by the like military and feudal services which prevailed in his native duchy of *Normandy*; the nature of which was scarcely known here before his arrival. This new establishment, involving in it a variety of prerogatives and duties due from such tenants to the king, necessarily introduced a great alteration in the constitution of the kingdom. The remedies for the recovery of these duties, and the consequences of neglecting them, together with the appendages of such tenures, became the most material and intricate learning in the law: by far too intricate for the understandings of the suitors in the county-courts and courts-baron; and which, for that reason, came usually to be discussed in the sovereign Eyre of the king. The subsequent treasons too, of such of his *English* subjects as were permitted to retain their ancient possessions, had so much increased the Conqueror's ability during the first thirteen years of his reign, to enlarge the number of these grants with feudal reservations, that he at length took occasion, in a general meeting of the realm, to introduce universally that system of laws, which at first had only a partial reception amongst his followers from *Normandy*. The grand principle of this system was, that all lands were held *mediately* or *immediately* of the king, by the services in the grants thereof respectively reserved.

Upon this general establishment of the *feudal system* in *England*, all the intricacies and refinements which distinguished it on the continent, were imported into this country by the *Norman* justiciars; and, as the suitors and judges in the inferior courts were unable to decide the law on the subject, it became necessary to apply in almost every case to the supreme council of the crown; which necessity was still further

further increased, by a distinction introduced soon after the Conquest, between courts of record and not of record. For by an edict of the Conqueror's it was ordained, that all proceedings in the king's courts should be carried on in the *Norman*, instead of the *English* language. By this edict the remedial influence of the county-courts, and other inferior jurisdictions, was necessarily narrowed: for as the judges and suitors of such courts did not understand that language, they were prohibited from recording their acts. So that the discussion of matters of importance ceased in the great *Saxon* seats of justice, and an *original* jurisdiction over all causes was given to the supreme court where the king presided in person. The dignity and importance of the county-courts was also further impaired by the secession of the bishops (a), and the separation which took place in consequence of their secession between the *civil* and *ecclesiastical* courts. The earls too shortly afterwards neglected to attend them; from which time their consequence has been gradually declining, and though there remains a shadow of them to this day, it is but a shadow of their pristine splendour and dignity.

The clergy had been for some time endeavouring throughout *Europe* to exempt themselves from the secular power; and as they had all along seconded the views of the Conqueror, he thought it most prudent to comply with their demands. He therefore granted them several immunities, and amongst the rest he permitted the bishops to establish courts in their several dioceses, in which they assumed a jurisdiction over the inferior clergy and all their dependants, who were to have justice dispensed to them in the consistorial court by the bishop or his substitute. The erection of these courts for the future investigation of ecclesiastical matters, with which the secular judges were no longer to interfere, not only deprived the county-courts of a great number of causes, and the attendance of many suitors, but also of the assistance and veneration they derived from the learning and ability of the prelates. And though the disputes which afterwards arose between the bishops themselves, and such of the clergy as were able to cope with them, called for the necessity of a jurisdiction somewhere, yet their litigations usually came into the sovereign *Byre*. For however willing in those days they might have been to appeal to the supreme pontiff for justice, they were nevertheless glad to have it administered at home by the king's court, held before himself

Distinction between courts of record and not of record.
Introduction of Norman language.
Effect thereof.

Original jurisdiction given to supreme court.

Secession of bishops from county-courts.

Decline of county-courts.

Separate jurisdiction of the clergy.

Ecclesiastical courts established.

Another cause of decline of county-courts.

(a) In the time of *William* the Conqueror it was ordained, *quod Episcopus vel Archidiaconus* (who before sat with the sheriff) *placita in hundredo non teneat*; but right shall be done by himself according to the Canons, &c.

in person at the time of his parliaments; which were usually assembled where he kept the three great festivals of *Christmas*, *Easter*, and *Whitsuntide*.

Jurisdiction of
supreme council
increased.

The *original* as well as *appellate* jurisdiction, exercised by the supreme council when convened (a), in like manner as by the *Wittenagemote* in the Saxon times, drew into it the final determination of all causes of consequence, whether of ecclesiastical, civil, or criminal consuance. So extensive a jurisdiction interfering with the discussion of matters of state, occasioned the members thereof, when assembled, to sit for a long time together. But the Conqueror, finding these long sessions inconvenient, and apprehending danger from so large a meeting of his chief vassals, under the pretext of easing the subject by erecting a constant court for the trial of causes and determination of appeals, took an opportunity to separate the *judicial* power of the members of this assembly from their *deliberative* as counsellors to the crown. In this new court, erected in his own palace, and thence called by *Bracton*, *Aula Regia*, sat with other chief vassals, the first officers of state, the Chancellor, Earl MARESCAL, Chamberlain, Seneschal, and Treasurer; over all of whom presided a special and new appointed magistrate, next in authority to the king himself, called *Capitalis Justiciarius totius Angliae*.

Inconvenience
thereof.

Judicial power
separated from
deliberative.

Institution of
the Aula Regia.

The Aula Regia
was ambulatory.

Jurisdiction
thereof; original
—appellate.

How increased
by cognizance
of causes above
40 s.

Vicontiel
writs, what.

Justices, what.

This new-erected court by its constitution was ambulatory, and followed the sovereign whenever he changed his place of abode. In the county where it happened to be, it had an *original* jurisdiction of all matters arising therein, whether of a civil or criminal nature; but of causes arising in other counties it only exercised an *appellate* jurisdiction. And to give this capital *justiciary* a more extensive authority, and to lessen still further the remaining influence of the county-courts, it was ordained by the Conqueror, that from thenceforth all causes of action amounting to *forty shillings* and upwards should be determined by the king's *writ*, which was usually made returnable in the *Aula Regis*; but in some cases they were made out to give the sheriff authority to proceed in the suit, and then they were called *Vicontiel*. *Vicontiel* writs were of two sorts, the one founded on *Torts*, the other on *Contracts*. The *vicontiel* writs adapted for torts were those of *trespass*, *replegiari facias*, *nuisance*, and others of the like nature; and those for matters of contract were called writs of *justices* (b), which was a command to the sheriff to do

(a) *Vide* Spel. Glof. verbo *Parliamentum*.

(b) Though a *Justices*, *Replegiari facias*, and other *vicontiel* writs may be had of course at this day, and if improperly issued, the party has no redress but by *superseas quia improvide emanavit*; yet it is not improbable but that, at the commencement of the Norman period, before the extent of the remedy given by

do justice between the parties in that particular cause; for if the debt or demand exceeded *forty shillings*, the sheriff was no longer empowered to hold plea thereof by a *plaint* levied in court as in the Saxon times. So also the *writ of right*, issued to enable the lord to hold plea of land within his jurisdiction. For the maxim introduced by the *Norman* justiciars was, that no one could hold lands without the king's *patent*, nor plea of *forty shillings* without the king's *writ*.

Though these great officers at the establishment of the *Aula Regis* sat together in court, as well to try the civil and criminal matters referred to them, as to receive and settle the revenue; yet our legal *antiquarians* think, that, even at this period of time, each of them had a peculiar office and jurisdiction assigned to him. The Chancellor, it is supposed, as being the king's chaplain and confessor, more immediately presided when the complaint was of some oppressive act of the sovereign;—the Treasurer, when the revenues and rents were to be received from the sheriffs, and the fines and amerciaments from the escheators, and on passing the public accounts;—the Constable and Mareschal (a), upon the discussion of matters of honour, and war, and the rights of foreigners;—the Seneschal, when the dispute arose within the limits of the royal residence;—and the Chamberlain, when the money was to be told in and paid out of the Treasury.

The Conqueror, like his predecessors, had his royal table supported by the tenants of his *ancient demesnes*, whose annual renders of *corn, sheep, oxen*, and other produce of their lands, were brought to the place of his residence. And that the same might be paid with more punctuality and convenience to the respective tenants, the sovereign frequently changed his place of abode. But *Henry the First* generally commuted these renders into certain fixed sums, after whose reign, the removal of the king's household being no longer necessary, we find it to have been less frequent. The sovereign's remedy against these tenants in *ancient demesne*, upon neglect to discharge their bounden renders, was by entry and seizure of their lands, without applying to any court for redress, or taking out any process against them. And if such

by the various writs of *accedas ad curiam, recordari facias loquelam, falsa judgment*, &c. were fully established, the Chancellor exercised a discretion in allowing these writs, and only permitted them to go in those cases where the policy of reducing the county-court was not necessary to be regarded. *Vide* of superceding Writs, 1 *Eq. Abr.* 415. and title Writs in the abridgments.

(a) In our old books there is great confusion with respect to the number and duty of the Marshals. *Vide* Mr. *Madox* from page 31 to 33, and several of the old statutes. Lord Coke styles the marshal who presided with the constable, the *Earl Marshal of England*, by way of pre-eminence. 4 *Inst.* 123. Co. Lit. 74.

Plaint, extent thereof.

Writ of right.

Different officers presiding in Aula Regia.

The respective duties of

the chancellor;

treasurer;

constable and mareschal;

seneschal; chamberlain.

Tenants of ancient demesnes; their rent;

afterwards reduced to a fixed sum.

Remedy of sovereign against them.

entry and seizure were improperly made, the tenant's only remedy was by petition to the king's bailiff, the steward of the court of *ancient demesne*, who heard and finally determined the matter; so that no other court interfered between the king and his tenants, with regard to these renders (a).

Of the other
chief vassals.

Our greatest legal *antiquarians* have so long and so widely differed, concerning the other chief vassals of the crown previous to the Conquest, whether they were military tenants, socage tenants, or whether they were tenants at all, but merely allodial possessors (*allodarii*), that it might appear unbecoming to interfere with their discussions. But certain it is, and indeed agreed by them all, that the slavish services, the perpetual concomitants of our old tenures, were unknown in this country till introduced by the *Norman* justiciars shortly after the Conquest. At which time the establishment of

Of the feudal
burdens and
fines.

the feudal burdens of *ascuage*, *sales for alienation*, *primer seisin*, *aids*, *wardship*, *marriage*, and *relief*, with their numberless appendages, multiplied the pretensions of the crown to some claim or other, on every alteration in the family or domestic concerns of the tenants. These claims and pretensions, and disputes in consequence of them, were at first heard and ad-

Disputes con-
cerning them,
where settled.

justed with all other matters of importance in the court where the Chief Justiciar presided. But as the revenues thereby derived were very considerable, and generally well paid to the receivers in the country, it was found necessary that their accounts should undergo a closer inspection and revision than could possibly be given them in the supreme court, whose attention was wholly engrossed by the multifarious matters referred to it. The Conqueror, therefore, appointed a select committee, of whom the Treasurer was the chief, to sit apart from the supreme court, in a chamber of his palace, particularly to *audit* these accounts, and compel the payment of those dues to which he laid claim. This court was built on the model of one erected for the like purpose in his own native duchy. It assumed the name of the king's *Scaccarium* or Exchequer, and the same authority was delegated to its judges, as was exercised by the *Masters of the Exchequer* in *Normandy*. This new court on its establishment stripped the *Chief Justiciar*, in the very zenith of his power, of a material branch of his jurisdiction; though it appears that this powerful magistrate for some time afterwards continued to interfere in the Exchequer. For in dialogue *de Scaccario*, lib. 1. c. 9., speaking of this officer, it is said, "he was great in the Exchequer, as well as

Origin of court
of Exchequer.

An abridg-
ment of chief
justiciar's
power.

(a) *Vide* Brac. lib. 1. c. 11., who, in describing these tenants, says, "*quod a gleba amoveri non poterint, quamdiu solvere possunt debitas pensiones.*"

" in

“ in the court—so that nothing of moment was or could be “ done there without his consent or advice.” However, this first deprivation of the Chief Justiciar’s authority, who on his appointment was invested with powers so large and boundless, that he became both a tyrant to the people, and formidable to the crown itself, certainly arose from mere necessity, and not from the jealousy either of the sovereign or his people, to which the subsequent diminutions of it are properly attributed.

In this court of *Exchequer* were all matters relating to the revenue hereafter to be determined; so that when any patent or royal grant was sealed by the Chancellor, the same was *estreated* into this court, and execution went forth for the reservations therein contained to the crown. So all original writs from the Chancellor, giving other courts a jurisdiction to hear and determine causes between the people, gave the court of *Exchequer* a power to collect the fines and amerciaments due to the king, in the progress and investigation of those causes imposed on the parties. And when the great court inflicted fines on criminal offenders, the records were *estreated* into the *Exchequer*, from whence issued a process to get in the same; or if they had been paid to the clerk, he was made to account for them there. In this court, too, all the Sheriffs, Coroners, Escheators, and other officers employed in receiving the revenue, were to make up and pass their accounts. With jurisdiction over such matters, this court continued till the reign of *Edward the First*, who is supposed to have formed it in the manner we find it at this day; consisting of *two divisions*, the receipt of the *Exchequer*, and the court or judicial part of it, which hears causes relating thereto. And it has long since been both a court of *equity* and *common law*, and holds plea of matters not at all relating to the revenue, arising between subject and subject.

The process used on the common law side of the court of *Exchequer* may be seen in a variety of tracts, and does not properly come within the scope of this work, which is only intended to explain the origin and operation of the process of the courts of King’s Bench and Common Pleas; but to do this in a satisfactory manner, it was necessary to treat slightly of the jurisdiction of the *Aula Regis*, instituted by the *Norman* invader, and to shew what share of that jurisdiction our several courts of justice at this hour respectively exercise.

From what has been said of the origin of the *Exchequer*, it may naturally strike the student as something remarkable, that there should exist in it a court of *equity*, as well as a court of *law*. The precise time when the court of *Exchequer*

Jurisdiction of
the *Exchequer*.

Of *estreats*, &c.

How altered by
Edw. I.

Of the equity
side of *Ex-
chequer*.

INTRODUCTION.

[Sec. I.

Origin account-
ed for.

Jurisdiction in-
creased by the
causes of king's
debtors being
heard there.

And the fiction
of the *quo*
minus.

quer first assumed an *equitable* jurisdiction, or from what cause it originated, is not well ascertained. But we may reasonably suppose, that when it was found necessary, in order to effectuate justice, to propound articles to compel persons to answer *upon oath* to allegations therein contained, between subjects in civil suits, and which articles were made to the king, and by him generally referred to his chancellor, the officer of the crown (in later times called the Attorney-General) was induced to exhibit like articles in the Exchequer for the discovery of facts relating to the revenue. Hence arose informations for *treasure-trove*, and for the discovery of the forfeited goods of an *outlaw* filed in the *Exchequer* (a). And when afterwards this court, by the exposition they put on the statute of *Rutland* (b), by which it is enacted, "that no suit shall be prosecuted in the Exchequer, unless it concern the king or his officers," held in contradiction to the evident meaning of the legislature, that pleas between subjects who were *debtors* to the crown, came within the idea of ministers of the Exchequer, this court upheld a jurisdiction, as well of matters inquirable by exhibited articles, as of matters cognizable in actions at common law. And though the *subpœna* was not invented in Chancery till the reign of *Edward* the Third, they certainly before that time exercised both an equitable jurisdiction on exhibited articles, and in actions at common law, whenever the complainant suggested that he was a *debtor or fermor to the king*. It seems too, that before the *subpœna* was invented, the process they used was a *venire*, attachment, and commission of rebellion, the process usually awarded in the *Aula Regis* on great and particular occasions. But when *Richard de Waltham* had devised the *subpœna* returnable in Chancery, the treasurer of the Exchequer, in imitation of it, framed a similar writ for matters of *equity*, under the seal of his own court, returnable before himself, instead of using the process of the *venire* in the first instance; retaining, however, that and its following process, in case the party should shew any contumacy to his *subpœna*. The Exchequer writ of *subpœna* was also afterwards extended as an original process in a civil action commenced there, though how long before the reign of *Henry* the Eighth is not well known. And this writ, together with the *venire ad respondendum*, and writ of *quo minus*, which came into use in civil actions between subject and subject in consequence of the above exposition of the statute of *Rutland*, are the three methods at this day of commencing civil actions in the court of *Exchequer*. But to return to the remaining jurisdiction of the *Chief Jusficiary*.

(a) Hard. 22.

(b) 10 *Edward* the First.

The *Aula Regis*, wherein the magistrate presided, had still an original jurisdiction over all causes of moment not immediately concerning the revenue, cognizance of all criminal offences committed in the county where it happened to be, the punishment of all capital delinquents, and an *appellate* jurisdiction from every inferior common law court in the kingdom. It was not long, however, before the authority which this magistrate enjoyed received another considerable shock. For as it was the duty of the *Chief Justiciar*, as well as the rest who composed the *Aula Regis*, to attend their sovereign, and be at hand to advise him in all matters of law and state, the people who had causes depending complained loudly of the inconvenience they suffered in being necessitated to follow the king's suit from place to place to have them determined. A restoration of the ancient constitution, and particularly of the power of the county-court, the grand seat of justice in the *Saxon* times, whereof they had been unjustly deprived, partly by the policy and partly by the force of the *Normans*, was now much wished for by the people. And though the dignity of the county-court was not only greatly diminished, but the matters usually disputed were become too intricate for the understandings of the suitors, yet, from the intolerable expence and delay occasioned by following the supreme tribunal, travelling about with the king's person, the chance of injustice seemed preferable to procrastination. In the reign of *Rufus*, the Conqueror's son and successor, it was found expedient to pare off some of the excrescences of the *Norman* regulations, by restoring in certain cases the laws of *Edward* the Confessor. The outline of the new constitution, however, was suffered to remain as in his father's time. In the reign of *Henry* the First some little alteration, with respect to the trial of causes in a more easy and expeditious manner for the subject, took place for a while. And in the following reign of *Stephen* the Usurper, though much was promised, little was performed towards redressing the numberless grievances of the people. But in the time of *Henry* the Second the laws were revised and methodised, and reduced into a regular order; and to obviate the inconveniencies of following the supreme court, this prince, at the parliament of *Northampton*, established certain officers, called *Justices in Eyre*, *justiciarii itinerantes*; I say established such justices, contrary to the old chronicles, which maintain that this prince first introduced them. For Mr. *Madox* (a) gives instances upon record of such justices going their circuits as early as the eighteenth year of king *Henry* the First. And I

Aula Regia still retained great power.

Causes of its abridgment.

Justices in Eyre established.

(a) *Hist. Stace*. d. 3.

follow his opinion in preference to that of the monkish writers, in consequence of lord Coke's advice not to mind *chronicle law*, when put in competition with *records*. Besides, lord Lyttleton seems inclined to think that such justices were first appointed in this island by king Henry the First, who had observed the great benefits derived to the people in France from a similar institution by Louis le Gros; and says, that during the intestine commotions under Stephen they had been disused, and were therefore only revived and regularly settled by king Henry the Second.

Their circuits.

These new-created judges at first went their circuits frequently, but were soon prohibited from going them oftener than once in seven years. This prohibition was probably owing to the jealousy of the barons, whose independent and hereditary jurisdictions were much infringed by this regular exercise of power, derived from the immediate authority of the sovereign. It was not long, however, before the barons, finding it necessary in order to support their pretensions against the crown, to make some regulations in favour of the commons, stifled the jealousy they had formerly conceived against the *Justices in Eyre*, and expressly stipulated with their sovereign that they should be sent into every county once in the year to try certain actions, then called *Recognitions* or *Affizes* (a). Affizes were remedies which had been introduced at the same parliament of Northampton, for the purpose of trying titles to land in a more certain and expeditious manner before commissioners appointed by the crown, than before the suitors in the county-court, or the king's justiciars in the *Aula Regis*. The invention of this mode of trial, as well as that of the grand affize, or trial by a special kind of jury in a writ of right, at the option of the tenant or demandant, instead of the *Norman* trial by battel, are attributed to Glanvil, Chief Justiciar to king Henry the Second.

Affizes, what.

Justices in Eyre had also commissions.

Extent thereof.

These *Justices in Eyre*, besides being empowered to take the affizes, were commissioned also by the king, or the guardians of the realm in his absence, to do justice of all kinds in their respective circuits, where the property in contention did not amount to half a knight's fee, or where the controversy was of that importance that it could not be determined but in the sovereign's presence. And if a matter of difficulty arose in taking the affize, these judges were afterwards directed to adjourn it, and cause it to be brought before the offices of the bench (b). These itinerant magistrates were also charged to make inquisitions concerning robbers and

(a) Vide *Magna Charta*, c. 12.

(b) *Ibid*.

malefactors in the counties through which they passed, and to take special care of the rights and profits accruing to the crown from the reservations in the feudal grants. And at their first institution, they were directed to inquire of several matters which the preceding commotions had made necessary (a).

Wherever these justices came they superseded the *tourn*, and all matters civil and criminal were referred to their judgments; but still an appeal lay from their determination to the great *Aula Regis*. And if the king went into the county where they happened to be sitting, all pleas before them immediately ceased, and came into the sovereign Eyre before the Chief *Justiciar*. Their power.
Appeal from
their decisions.

In their circuits these Justices in Eyre acted also as auxiliaries to the supreme court; for whenever any matter of fact was strongly litigated by the contending parties above, and which arose at a great distance from the *Aula Regis*, there issued a writ, directed to the Chief Justice in Eyre, to inquire into the fact (b). From this circumstance we may perhaps look for the origin of the practice in the court of Chancery, of directing a *feigned issue* in law to try a fact strongly controverted between the parties in a suit there. Nor is it improbable, but that the legislature at Edward the First's second parliament at *Westminster* took the hint from the like usage, to ordain, that pleas depending in either bench that required an easy examination should be tried in the county wherein the facts arose, before the justices appointed to take the assizes, by virtue of the writ given by that statute; from which has arisen the very beneficial jurisdiction of the auxiliary courts of *nisi prius*. Their further
jurisdiction.

Origin of feigned
issues;

and of the
courts of nisi
prius.

Upon receiving a plea, if it was of a matter of fact, a jury was impannelled by the sheriff, who gave in their verdict to the Justice in Eyre, which was afterwards sent to the *Aula Regis* to be recorded. In debt upon *simple contract*, the defendant charged therewith might *wage his law* as in the Saxon times. But *wager of law* was never permitted, unless the defendant bore a fair and irreproachable character; and it was also confined to such cases where a debt might be supposed to be discharged, or satisfaction have been made in private without any witnesses to attest it; as in actions of debt on simple contract, or for an amercement in a court-baron, in actions of detinue, account, and on parol submissions to an award. For on all these occasions the action is How their
power was ex-
ercised.

Of the wager of
law.

In what cases
allowed.

(a) Vide Lord Lyttleton, b. 4. sub anno 1176, and the records cited from *Madox* in his Appendix, No. 11.

(b) Vide *Riley's Plead. in Parl.* 74, 75.

built on a feeble foundation, and the law presumes that the party might either have discharged the debt in secret, or before witnesses that are dead or not to be found. In actions on *specialty* debts, witnesses were produced to attest the truth of the deed (a). In *pleas of land*, the investiture thereof, signed by the *pares curie*, was produced to the court; but if that could not be found, the parties joined issue by *battel*, till that barbarous and absurd mode of trial fell into disuse, and the grand assize was introduced in its room. *Criminal matters and offences* were inquired of by an inquest impanelled, and presented on articles of inquiry, as in the *Saxon* times. But the old custom of putting the party accused to purge himself by the *ordeal*, or in lesser offences, by *compurgators*, was disused, and instead thereof a *petit jury* was introduced, to hear the evidence of the fact wherewith he was charged. And then the prisoner did not, as formerly, produce his witnesses to the *first* jury, who now only heard evidence to accuse, but reserved his defence for the *second* jury, before whom he was to be tried.—Hence arose the distinction between the *Grand* and *Petit* Juries.

Ordeal, &c.
abolished.

Petit jury introduced.

Distinction between them and grand juries.

Records of judges on circuits lodged in Exchequer.

When the *Justices in Eyre* returned from their circuits, they lodged the records in the *Exchequer*, from whence issued process to collect and gather in the fines and amerciaments due to the crown. But when the division of the courts took place, in the reign of *Edward the First*, the records were deposited in the respective treasuries, and only *extracts* thereof, so far as related to the revenue, were made out and transmitted to the *Exchequer*.

Writ of error and appeal from their judgments.

The *Justices in Eyre* having only a delegated power from the crown to hear and determine the causes referred to them, a writ of error and appeal lay from their judgment to the supreme court where the *Chief Justiciar* presided. This right of appeal brought back to that powerful magistrate the final determination of almost all causes of consequence, and occasioned not only a great delay of justice, but a considerable increase of expence to the parties. So great an influx of business to the supreme court, neither affording them leisure to hear nor opportunity to dispatch the causes re-

(a) In those days a great difficulty attended the proving of a deed. For, according to Lord Coke, they antiently added the names of the witnesses in the contents of the deed, after the clause of "*in cujus rei memoriam*," and impanelled them with the jury. This not only occasioned delay, from the necessity there was of awarding process to bring these witnesses in, but also from the cause being frequently obliged to be adjourned for their default. But to prevent this delay, and save the trouble and expence which attended it, *recognisances* were introduced; which being an acknowledgment of a debt in court, attested by the court itself, needs no other species of trial to make it more evident. Vide *Co. Lit. 6. a.*

ferred to them with expedition and punctuality, soon occasioned a loud cry for the establishment of another jurisdiction, for the sole investigation of *civil* disputes. And as by this time the extravagant powers assumed by the *Chief Justiciar* had kindled a jealousy in the crown, and sometimes filled the nation with just alarms for its privileges, a diminution of his authority was in the contemplation both of the king and the people.

Origin of court of Common Pleas;

From the first appointment of this officer by the Conqueror, his power, notwithstanding parts of his jurisdiction had been diverted into other channels, had yet, from various circumstances, been continually increasing. But Mr. *Madox* thinks, that this increase of authority was rather owing to the personal dignity and consequence of those who had been successively appointed to the office, than to the extent of the jurisdiction allotted to it. In this, perhaps, he is not mistaken; for we find it to have been generally held by some great prelate or powerful baron. And it appears that all the great offices of the *Aula Regis* were usually filled with the first personages in the kingdom; it being observed by our ancient writers, "that the splendour of the king's court" appeared much in the greatness of his ministers; but that "some were so great in themselves, that they diminished the grandeur of their master, and, by attracting the eyes of the multitude, made the king often entertain wishes to diminish that lustre, which so much exceeded his own." The frequent attempts of our princes to lessen the power and authority of the *magnates regni*, are very conspicuous in the subdivision of the great *fiefs*, which on escheats and forfeitures had been made; but which practice was soon put a stop to by the statute *de donis* (a); however, not before some of them had received great checks in acquiring and perpetuating in their own families their extensive possessions.

owing to the multiplicity of business of *Aula Regia*;

and the great power of the Justiciar,

The diminution of the jurisdiction and authority of the *Chief Justiciar*, the object of our present attention, must certainly have been an essential part of the policy of the descendants of *Henry* the Second. But perhaps it was owing more to the assumed consequence and importance of the *Chief Justiciar* himself, than to any thing else, that this great office received the most severe and fatal blow to its authority—I mean by the erection of the court of *Common Pleas*, which seems to have been first separated from the *Aula Regis* in the time of *Richard* the First, though it was not confirmed and made stationary at *Westminster* till the seven-

which the sovereign wished to check.

Antiquity of court of Common Pleas.

(a) *Westminster* the second, 13 *Edw.* 2.

teenth year of king *John*. In this opinion I follow Mr. *Madox*, although it must be acknowledged, that he differs from the authority of most writers on this subject, and amongst others of Lord *Coke*, who in *Coke Lyttleton*, 71. b. and in the preface of his eighth report, seems inclined to believe that the *Common Pleas* was not only a distinct court at the time of *magna charta*, but that there was a court of such peculiar and separate jurisdiction even before the Conquest. Lord *Coke* as a lawyer, no doubt, merits our greatest reverence; but *Madox*, as an antiquary, is certainly deserving of our attention, and particularly in a matter of this sort, in which we cannot but suppose his researches to have been higher than those of his lordship. According to the antiquary, then, for some time after the Conquest, there was (as I have said before) but one great and supreme court, called the *Aula Regis*, exercising a jurisdiction over civil and criminal matters, from which gradually sprung the courts of *Exchequer* and *Common Pleas*; and as the former became altogether independent, so the latter became wholly distinct from it. He thinks too, that the separation of the *Common Pleas* took place in the reign of *Richard* the First, though it was not (as he (a) says) firmly established till that of *Henry* the Third. In this opinion the antiquary seems to be confirmed by some remarkable passages in the history of that reign, in which he lays the foundation of the *Common Pleas*, one of which in particular I shall advert to.

Its establishment greatly owing to the cabals of the Justiciar and great officers of state.

Amongst the various schemes put in practice by *Richard* the First, to obtain money to support his projects against the infidels, he forgot the policy which it was clearly his interest to pursue; and while he was intent only on that one object, neglected altogether the rights of his crown, and the welfare of his people. For we are informed, that he put up all the highest offices and titles to sale; and, amongst the rest, sold that of *Chief Justiciary* to *Hugh de Puzas*, bishop of *Durham*, for one thousand marks; which prelate was also rich enough to buy the earldom of *Northumberland*. When *Richard* afterwards set out on the knight-errantry of a *Croisade*, he intrusted the guardianship of the realm to this *Hugh de Puzas*, jointly with his favourite *Hugh de Longchamp*, who held the bishopric of *Ely*, the office of chancellor, and who was also the Pope's legate. Whether *Puzas* conceived, as he had bought the office of *Chief Justiciar*, it was an infringement on the rights of his purchase to put another in commission with himself in the viceroyship of the kingdom; or whether it was owing to the jealousy or ambition of *Long-*

(a) Vide *Madox*, *Excheq.* on the division of the courts.

Longchamp, it is certain, that the instant the king was gone on his project, these joint guardians, from their quarrels, threw the whole kingdom into a flame. In their contentions *Longchamp* got the better of *Puzas*, and not only compelled him to resign all his offices, but usurped that of *Justiciar* himself, and sent *Puzas* to prison. *Richard's* time was so much taken up with the Saracens while abroad in the Holy Land, that, notwithstanding these commotions reached his ears, he took no step to deprive *Longchamp* of the authority he had usurped; but suffered him to continue for some time in the full enjoyment of his offices: till at last his insolence and oppressions roused up the barons, who, under prince *John*, met at *Reading*, and not only stript him of his usurpations, but compelled him to fly; and gave the office of *Chief Justiciar* to the archbishop of *Rouen*.

If then we consider the several great offices vested at one and the same time in *Puzas* and *Longchamp*, the kingly authority which they possessed, and the deep schemes of ambition in which by their rivalry they were engaged, we cannot think that either of them when in possession of the office of *Chief Justiciary* wished for the *Aula Regis* to hold a long session; or that they had any great inclination, or much leisure, for the hearing and investigation of private matters referred to them. To their cabals and ambition then, more than to any thing else, we may look for the first separation of the *Common Pleas* from the *Aula Regis*; as in all probability, to save their own trouble and time, they delegated the cognizance of civil concerns to others of the Justiciars, who, for the better hearing thereof, and that they might not protract the session of the *Aula Regis*, left the High Bench and retired into some convenient apartment to hear those pleas, which being merely civil, and more technically intricate, required a more private discussion. Nor did the *Chief Justiciars* think they were parting with their authority for ever, by such temporary delegations of it; as they reserved to themselves the power of resuming it whenever they chose, and an appellate jurisdiction to rectify any erroneous proceedings in the causes referred to their substitutes. But the nation having once experienced the benefits arising from this newly-constituted jurisdiction, loudly called for its permanent establishment; and the barons dreading the resumption of the power of the *Chief Justiciar* in its full latitude, and glad to see it once diminished, joined in the voice of the commons. Accordingly, in the succeeding reign of king *John*, when he, to quell the insurrections of the great feudatories, consented to the two famous charters of English liberties, *magna carta*, and *carta de foresta*, the

By delegating their civil jurisdiction and separating the trial of causes from the *Aula Regia*.

The convenience of which was felt;

and insisted upon to be continued.

This court was
fully established
by the Magna
Charta,

and rendered
immoveable,

at Westminster.

Called also Com-
mon Bench,
why.

Great abridg-
ment of Justici-
ar's power.

Office abolish-
ed.

Aula Regia,
now called the
King's Bench.

barons took care to provide, amongst other things equally calculated for the relief and protection of the subject, that this court for the investigation of the *civil* concerns of the people should be fully established. With this article that unfortunate prince did not long hesitate to comply, having himself experienced many inconveniences in the earlier part of his life from the super-eminent authority exercised by the *Chief Justiciars*, whose tyranny had extended itself, as well over the prerogatives of the king as the rights of the people: and so much so, that he himself had once formed a design to abolish the office, but which unfortunately proved abortive, from the great ascendancy which that magistrate had gained in the country. The barons therefore from their dislike of the office, under the pretence of relieving the people from the inconveniences of following the *Aula Regis* from place to place to have their causes determined, made it an article in the *great charter*, that "*Communia placita non sequantur curiam nostram, sed in aliquo loco certo teneantur.*" This article effectually established and confirmed the *Common Pleas*; and the *loco certo*, where these pleas were to be heard and determined, was fixed to be in a recess of the Great Hall of the Palace at *Westminster*, built in the time of king *Rufus*, where the sovereign usually resided. The *Common Pleas* has mostly (a) since that time remained in the same place, while the court of the *Chief Justice of England*, which afterwards sprung from the old root of the *Aula Regis*, continues ambulatory with the sovereign.

By the establishment of the court of *Common Pleas* or *Common Bench*, as it was stiled to distinguish it from the *High Bench*, whereon the *Chief Justiciar* sat as representative of the sovereign, this magistrate was intirely stript of another considerable branch of his jurisdiction; and his power was so much curbed by other articles in the Great Charter, ratified and confirmed by king *Henry the Third*, that we behold this mighty officer gradually on the wane, during the long and troublesome reign of that king: towards the end of which there appears to have been no such magistrate; for the last *Chief Justiciar* we read of in history, and it is even doubted whether he was *Chief Justiciar* or not, was *Hubert du Burgh*. The court too, in which this magistrate used to preside, seems by this time to have lost its name of the *Aula Regis*, though whether it assumed the name of the *King's Bench* or not, till the succeeding reign of *Edward*

(a) I say mostly, contrary to the opinion of many, who affirm that it has *ever* since remained there; for by the statute 2 *Edw.* 3. c. 11. it appears, that the *Common Bench* had been removed; and that statute provides, that it shall not hereafter be removed without warning given the suitors.

the First, does not appear. For *Bracton*, who wrote towards the close of the reign of *Henry* the Third, and was *Chief Justice*, speaking of the remaining jurisdiction in it, says, "*Habet Rex plures curias in quibus diverse actiones terminantur, & illarum curiam habet unam propriam, SICUT Aulam Regiam, & Justiciarios capitales, qui proprias causas Regis terminant, & aliorum omnium per querelam, vel per privilegium, seu libertatem.*" And afterwards, speaking of the Judges, he says, "*Item Justiciariorum quidam sunt capitales, generales, perpetui, & majores a latere Regis residentes, qui omnium aliorum corrigere tenentur injurias & errores* (a).

Besides the establishment of the *Common Pleas*, the *Aula Regis*, during the reign of *Henry* the Third, had received other considerable shocks, particularly that of the chancellor's withdrawing from it, and exercising his judicial authority alone in a separate apartment. But the precise time of the chancellor's secession is not well ascertained, though there is great reason to think it took place in the course of that reign; and that it was owing to the intestine commotions and disputes which happened, not only between the king and the barons, but between the *Magnates Regni* themselves when assembled together, which wholly prevented the chancellor from performing the ordinary functions of his office in the Great Hall of the Palace, where the sovereign for the most part resided.

The jarring interests that prevailed between the greater barons and the less, when convened together, had long called for their separation. In the reign of king *John* they had for a while been disunited; for the first traces which remain of their separation, in the constitution of parliaments, are found in the Great Charter obtained in his reign; though omitted in that of his son *Henry* the Third, in whose troublesome reign they again clashed with each other. The continual dangers to which the king and people were exposed from the factions and contentions of these great feudatories when assembled, and it not being well settled what distinct powers the assembly of the great or lesser barons should severally exercise, or where the extensive authority vested in the *Aula Regis* should reside, seem first to have suggested to young *Edward*, who had subdued the potent barons, the great idea of our juridical constitution; which he afterwards, upon his coming to the crown, with so much credit to himself, and happiness to his subjects, firmly established. This prince has been styled our *English Justinian*; for in his time

Originally only a criminal court, and court of appeal.

Before this the chancellor had seceded from the *Aula Regis*.

Improvements in our legal polity, made by Ed. I.

(a) These words clearly shew, that the *King's Bench* originally was a court other than a criminal court, and court of appeal.

the law came to so sudden a perfection, that Sir *Matthew Hale* does not scruple to affirm, that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together (a).

Supreme court
of parlian.ent.

King *Edward's* establishment of the constitution consisted, instead of one court of universal jurisdiction possessing a legislative as well as a judicial authority, and exercising a superintendant control over subordinate jurisdictions, of one supreme court called the *Parliament*, composed of the sovereign himself, the tenants *per baroniam*, and the representatives of other inferior tenants holding *in capite* of the crown; and after the *twentieth* (b) year of his reign of the representatives of the cities and burghs. In this court was vested the sole right of legislation, and the exercise of an appellate jurisdiction in the *dernier resort* over all causes civil and criminal, unless of ecclesiastical cognizance, which had before been given to the bishops; but which was only to assemble when summoned by writ. The residue of the jurisdiction of the old *Aula Regis* he branched out into different courts (c), which were called the *superior courts of common law*, and the *king's courts of maritime and military concerns*. He defined the limits of their several jurisdictions, so as not to interfere one with another. To each of them he assigned justices; and in that assignation seems to have had a parti-

Appellate juris-
diction.

Other altera-
tions in juris-
diction of the
Aula Regis.

(a) *Vide* a summary of the improvements made by this prince, 4 *Blacks. Com.* 423. 6-7. 3. and *Hale's Hist. Com. Law*.

(b) I have assigned, according to Mr. *Hume*, the 20th year of his reign, 1269, as the true epoch of the establishment of the House of Commons. For though there are still extant, writs from the 49th of *Henry the Third*, to summon as well knights, citizens, and burgesses to Parliament, yet this was but owing to the sedition of the Earl of *Leicester*. But when *Edward the First* had got the better of him at the *battle of Lewes*, the burgesses were never summoned from that time till the 20th of *Edward the First*; from which period, with a few interruptions, the constitution of the House of Commons appears to be regular, though the division, as we find at this day, did not take place till some time after. *Vide* Mr. *Burne*, 2 vol. 210. and 1 *Rym.* fol. 802.

(c) Lord *Hale*, in his *Analysis*, has accurately divided courts into such as are of record, and not of record. The former he subdivides into supreme, superior, and inferior. The supreme is the high court of Parliament. The superior he again subdivides into those that are more principal, as the *Lords' House* of Parliament, the *Chancery*, *King's Bench*, *Common Pleas*, *Exchequer*, the courts of the justices itinerant, *ad communia placita* & *ad placita foreste*. The less principal, he says, are the courts of *Gaol-delivery*, *Oyer*, *Terminer*, *Affize*, *Nisi Prius*, and *Palatinate*, courts of commission of sewers, and courts of justices of the peace. While he comprises, under the term of inferior courts of record, *corporation courts*, *courts-leet*, *sheriffs torn*, &c. And courts not of record, he says, are *courts-baron*, *county-courts*, *hundred courts*, *admiralty* and *ecclesiastical courts*. And all these, he continues, are bounded and circumscribed by certain laws and stated rules, with which all their judicial proceedings and determinations must square. *Vide* Lord *Hale's Analysis*, which, though little read at this day, on account of the excellent *Analysis* of Sir *William Blackstone*, still highly merits the attention of the student.

cular

cular reference to the peculiar provinces of jurisdiction exercised by the great officers respectively who composed the *Aula Regis*. And he reserved to one of these superior courts (that being the court in which he himself presided, and thence styled the court of *King's Bench*) all such power as was not parcelled out to the rest, and which according to ancient custom was to follow his person in his royal progresses through the kingdom. In this court sat, as representative of the sovereign, the successor of the *Chief Justiciar*, but invested only with the trappings of his authority, whose title was now changed to that of *Chief Justice of England*, constituted by the king's writ; while the other judges of the superior courts were all appointed by *patent*. With the change of his name, this magistrate lost his pre-eminence over the chancellor of *England*, which the *Chief Justiciar* had always retained.

To the chancellor, on this division of the courts, was committed the custody of the great seal of England; and, as a consequent thereto, the power of issuing all the king's original writs, whether directed to the supreme, superior, or subordinate jurisdictions. The chancellor therefore sat in a distinct court to hear reasons, why certain writs that were not of course should issue, and by his *fiat* alone the clerks were empowered to make them out. These writs were called *Brevia de Cancellata*, in contradistinction to the others, which were denominated *Brevia de Cursu*, and issued on paying the usual fees for them. To the chancellor also, as the king's chaplain, appertained the custody of his conscience, or, in other words, that jurisdiction which must necessarily reside somewhere in every state, which makes pretension to independent privileges, to redress such injuries as the subject may suffer from the more immediate and personal acts of the sovereign. When the king therefore had granted any property or privilege to a subject by *patent*, (which was and still remains the only method of transmitting any property or conferring any privilege by the crown,) as the same passed under the great seal in the chancellor's custody, this officer had, when the grant was either prejudicial, improper, or forfeited, a right to hold plea thereof by a writ of *scire facias* returnable before himself; and if upon the hearing it was found proper to be repealed, to give judgment (a), "*quod predicta litera patentes Domini Regis revocentur, adnullentur, & vacue & invalide pro nullo penitus habeantur & teneantur, ac etiam quod irrotulamentum eorundem cancelletur, cassetur, & adnibiletur.*"

Power of King's Bench.

Office of Justiciar now supplied by Chief Justice of England; his power.

Chancellor, his jurisdiction;

as to issuing writs;

as being king's chaplain;

as respecting patent;

(a) 4 Inst. 32. Bro. Sci. Fa. pl. 69. pl. 125;

as to inquests of
office;

When the sovereign also, upon any inquiry made by his officer, sheriff, coroner, or escheator, *virtute officii*, or by writ sent for that purpose, or by commissioners specially appointed, became entitled to lands or tenements, or goods and chattels, to the chancellor's jurisdiction were assigned (when the record thereof was transmitted) all such pleas as might arise thereon upon any claim of a subject; it being an unquestionable privilege from the earliest times, for any one to come in and traverse or deny the sovereign's title. This power of traversing *inquests of office*, as they are called in our law books, in cases where a party is aggrieved, has since been farther extended by several statutes made in the reigns of Edward the Third and Edward the Sixth, by which the remedy is become universal in cases where the subject before was driven to his *petition of right*.

as to petitions
of right.

To the chancellor also, by the illustrious Edward, was given a new jurisdiction to redress further injuries affecting the subject from the inadvertence or misconduct of the sovereign; this was by the invention of that universal remedy for such matters, called the *petition of right* (a). Before this time, the subject had but two remedies against the crown, the one the *traverse of office* already mentioned, the other a *monstrans de droit*. This latter was the proper remedy in cases where the subject's title appeared by record to be of as high a nature as the king's. But as there were injuries by which the subject might be affected from the mere act of the crown, and where his title might not appear of as high authority as the king's, or where he could not come in and traverse the record, this prince, in the plenitude of his justice, introduced the *petition de droit*. This was the proper remedy therefore, when the king was in full possession of the hereditaments or chattels, and the one could suggest a right to the same, at once controverting the king's, and grounded on facts alleged in the petition itself. The process adapted to the pursuit of this remedy was as follows: on presenting the petition to the king, it was indorsed by him, *soit droit fait al partie*, and delivered to his chancellor, who issued a commission from the office of the *Petty Bag*, to inquire into the truth of the allegations, unless that trouble was saved by the confession of the king's own attorney. If the commission went, and the title was found by the inquest of the king (b), a second commission might issue, and even a third, to give the petitioner an opportunity to establish his claim. But if title was found to be in the subject (c), there issued another

Monstrans de
droit; its de-
fects.

Petition de
droit;

how proceeded
on.

(a) *Vide* 33 *Edw.* 3. fol. 3. quoted in *Bro. Prerog. de Roi*, pl. 2.

(b) *Stamf. Prerog.* 73. a.

(c) *Ib.* 73. b.

writ before he could interplead with his sovereign, to inquire also into the king's. And the reason of it was, that if a verdict on trial was given for the party, the king was concluded for ever.—The judgment being, *quod manus Domini Regis amoveantur & possessio restituatur petenti, salvo jure Domini Regis* (a): which last clause is always added to judgments against the king, to whom no laches is ever imputed, and whose right (till some late statutes (b)) was never defeated by any length or limitation of time.

The chancellor had also jurisdiction given him over all civil matters, (except pleas of land,) wherein any officer of his own court was immediately concerned, and also of recognizances taken before him. But if any fact was disputed either on the *scire facias*, *traverse of office*, or the like, and issue was joined thereon, the chancellor was not permitted to try it: for as he had the power of issuing writs, he was prohibited from trying matters of fact, lest he should become as powerful as the *Justiciar* had been before; and, if he had been suffered to try facts, he could easily have overturned the whole juridical system established by King *Edward* the First, and the common law itself, by making out new writs returnable before himself, and giving unprecedented judgments thereon. Therefore in no case, when facts were controverted in Chancery, was the chancellor permitted to try them, but was obliged to deliver the record *propria manu*, into the court of *King's Bench*, from whence issued process to the sheriff to impanel a jury, whose verdict when taken was indorsed on the record, and returned to the chancellor.

A jurisdiction over these several matters seems to have been all that was originally assigned to the chancellor by our *English Justinian*; and though at this day it may appear to have been a very confined one, yet when we turn our eyes to the situation of things in those days, and recollect that this officer was usually a bishop, and first minister of the country, we cannot but think his forensic avocation as chancellor afforded sufficient employment for those hours which were not taken up with the labours of the statesman, or devoted to the duties of the prelate.

The occurrence of circumstances since the days of *Edward* the First, has given this court that great influx of business, and accession of power, which it enjoys now by *English bill*; similar to that sort of jurisdiction which the court of *Exchequer* drew into it, and still retains. But the peculiar jurisdiction by *English bill* for matters of equity, exercised by the chancellor, seems to have arisen in the following

Chancellor's jurisdiction over officers of his own court;

but could not try matters of fact, why?

When tried.

Chancellor's power increased.

(a) 2 *Instit.* 695. *Finch.* l. 460.

(b) 21 *Jac.* 1. c. 2. 9 *Geo.* 3. c. 16.

Proceeding by
English bill,
how intro-
duced.

Of the sub-
poena;

which soon
found its way
into Exchequer.

Power and ju-
risdiction given
to King's Bench
by Edw. 1.

manner. In the Roman law there was such a thing as an *usufructuary* possession, as distinguished from the thing itself; and when the emperor *Justinian's* pandects were discovered by the monks at *Amalfi*, they were studied with great avidity by the *Romish* clergy, from which they derived the notion of *uses*; and introduced them into this country. For when by the statutes of *mortmain* they were prohibited from purchasing lands in their own names, or from getting possession thereof by a feigned recovery of them in a real action, or by their own inventions, they introduced the custom of having the lands conveyed to their use. These conveyances being regarded in those days as a matter of conscience in the *feoffee to uses*, *John de Waltham*, who was chancellor to *Richard the Second*, by a strange interpretation of the statute of (a) *Westminster* the second, devised the writ of *subpoena*, and made it returnable before himself, to make the *feoffee to uses* accountable to his *cestui que use*. From this scheme the clergy derived great advantages for a while; till afterwards the statute 15th of *Richard the Second*, chap. 5. declared such taking to *uses* to be within the compass and purview of the statutes of *mortmain*, and such feoffments were amortized accordingly. But this process of *subpoena* returnable in Chancery, having been once introduced, it was afterwards extended to a variety of other cases in that court, and is now become universal. In an ancient treatise entitled *Diversité des Courts*, which *Sir William Blackstone* thinks was written in the sixteenth century, there is a catalogue of all matters then cognizable by the *subpoena*. The process of *subpoena* also soon found its way into the court of *Exchequer*, and came to be used there on the equity side of it, as the fundamental and operative process to bring the parties into court; and from the same root have sprung many bastard slips of *equitable* jurisdiction in the counties palatine, and other royal franchises in different parts of the kingdom. Having said thus much of the jurisdiction of the court of Chancery, and of those matters which were assigned to the chancellor on the division and establishment of the courts by our *Edward the First*, I shall next proceed to shew what sort of jurisdiction he permitted the *Chief Justice of England* to retain and exercise in the court of *King's Bench*.

To the *King's Bench*, on the distribution of the power of the *Aula Regis*, was allotted a twofold jurisdiction;—the one over all pleas of the crown not relating to the revenue,—the other over such matters between subject and subject as favoured of a *criminal* nature. Of criminal matters or pleas

(a) 13 of Edw. 1.

of the crown it retained a supreme original jurisdiction, and was termed the *custos morum* of the people; as, upon hearing of any offence militating against the first principles of justice or morality, it was empowered to inflict a proper punishment for it, and for that purpose might issue process returnable before itself.

The criminal matters therefore of which it had cognizance were of all kinds; but they were divided into crimes and misdemeanors, properly so called, and into pleas relating to franchises and liberties. As to crimes and misdemeanors, it had a jurisdiction assigned it over every species thereof, from high treason down to the most trivial trespass; and it had also a controlling power given it over all courts of criminal jurisdiction then in being, or that might be established. Over such as proceeded according to the common law, by *writ of error*, or *certiorari*; and over such as proceeded in a summary way, or in a course different from the common law, by *certiorari* only, unless specially prohibited by the statute establishing such summary or extraordinary jurisdiction. If a matter came into this court by *certiorari* before trial, the *King's Bench* might summon a jury, and try it at bar; and since the statute of *Westminster*, the second, may award a *nisi prius* to try it in the country, with the consent of the king's own attorney. And this court retained so much of the criminal jurisdiction exercised by the *Aula Regis*, that, upon its removal with the sovereign, it *ipso facto* suspended, if not entirely put an end to, all criminal proceedings before any other tribunal.

With respect to matters relating to franchises and liberties, if any subject or body politic had usurped any franchise or privilege, this court issued the *writ of quo warranto*, or received an information thereon filed *ex officio* by the proper officer of the crown, or filed such information on their own authority upon facts disclosed in the affidavits of private persons, provided there appeared sufficient ground for their extraordinary interposition. If the usurpation upon the trial was found unlawful, the party was ousted, and the franchise, if capable of seizure, seized into the king's hands. Also in cases where otherwise justice was obstructed, or the king's charter neglected, in the reign of *Edward the First*, was established a remedy, at this day frequently in use, called a *mandamus*. This writ was framed to command and compel inferior courts, corporations, and magistrates, to do that justice which in duty they were bound to perform. A *mandamus* is a *writ of right*, as some have imagined, founded on *magna charta*, though no instance has been traced of its having issued earlier than the reign of *Edward the First*; but

Pleas of the crown,

and power over all courts of criminal jurisdiction.

Extent thereof.

Usurpations of offices, &c.

by quo warranto;

or neglect of charters, &c.

by mandamus.

Nature thereof.

Or excess of jurisdiction,
by prohibition;
or illegal imprisonments, by habeas corpus.

Civil branch of jurisdiction,

confined to offences of a criminal nature.

It was a court of appeal.

Its process may run to any part of the king's dominions.

the court is bound to grant it, if applied for, without imposing any terms on him who demands it. Also when inferior courts exceed the jurisdiction assigned them, this court had the power given it of issuing the *writ of prohibition* to stop any further proceedings, as being then *coram non judice*. And if any subject was illegally confined, he was entitled to the prerogative *writ of habeas corpus*, issuing by the common law out of this court in term-time, or grantable by one of the judges thereof in the vacation. All which seem to have been the principal points of the *criminal* jurisdiction of this superior court, as allotted to it by king *Edward* the First.

As to the *civil* branch of its jurisdiction, that originally was very narrow indeed, though at this day it ingrosses most of its attention. For as a court of primary jurisdiction, it had only cognizance of injuries alleged to have been committed *with force*, or in which the defendant was charged with falsity or deceit. Injuries committed with force were all *trespasses vi et armis*, and others of the same nature, as *ejectment*, *replevin*, *rescous*, *pound-breach*, and *forcible entry*. And those wherein the defendant was charged with *falsity* or *deceit*, were remedied by *writs of conspiracy*, *deceit*, and the like; for in all these cases the defendant was liable to pay a *fine* to the Crown, as well as damages to the party complaining. In what manner the court of *King's Bench* obtained cognizance of the various civil actions it now holds plea of, will be seen in the next note; but it must be remembered, that this court was also constituted a court of *appeal* from the *Common Pleas*, and other inferior courts in the kingdom; and that a *writ of error* also lay in it till the 22d and 23d of *George* the Third from the *King's Bench* in *Ireland*, and it also lies in those cases where the chancellor proceeds according to the course of the common law, as upon *petition de droit*, *monstrans de droit*, *traverse of office*, *scire facias* to repeal letters-patent, or on *recognizances*, and *executions upon statutes*. And from this court, as being the superior court of the Lord Paramount, all prerogative process whatever issues to any place which has been, or may hereafter become, a part of the dominions of the Crown; and therefore when King *Edward*, by the conquest of *Wales*, had added that country to his dominions, the *King's Bench* had jurisdiction in *Wales*. When that king had also established his claim as *Lord Paramount* over the king of *Scotland*, the court of *King's Bench* actually sat at *Roxburgh* there, and afterwards summoned the *Scottish* king and his vassals to appear at *Westminster*. So at this day it has a jurisdiction over the *Isle of Man*, the *Norman* isles, and the plantations, by its prerogative writs; but with *Scotland*, *Ireland*, or the private

private dominions of the sovereign, as *Hanover*, it has nothing to do (a).

The court of *Common Pleas*, which had been perfected and established by *magna charta* at *Westminster*, was next in authority to the *King's Bench*; and as it was erected solely for the investigation of the civil concerns of the people, has very emphatically been stiled by Sir *Edward Coke*, The *Lock and Key* of the Common Law. By King *Edward's* plan in this court, all causes whatever, amounting to *forty shillings* and upwards, of a civil nature between subject and subject, were intended to be decided. For here not only all *real* actions, unless where the king himself was a party, who might sue in any of his courts, but also all personal and mixt actions were to be prosecuted; though in some personal and mixt actions the *King's Bench* had a concurrent jurisdiction assigned it, as in *trespass vi et armis*, *replevin*, *ejectment*, and the like: these favouring of a criminal nature, and in which the defendant was formerly liable to pay a fine to the king. The *Common Pleas* had also a jurisdiction given it over causes originally commenced in inferior courts, and at the instance of one of the parties, sometimes upon shewing cause to the court, at others without shewing any cause at all, was empowered to award process, as the writ of *pone*, *recordari facias loquelam*, *accedas ad curiam*, and *false judgment*, to remove the proceedings. But it seems that it had not the power to investigate errors in a judgment of a court of record, though some lawyers of eminence have supposed that jurisdiction belongs to it. This court too, as being one of the king's superior courts, was authorized, upon a suggestion made in term time, that an inferior court, whether temporal or ecclesiastical, was exceeding its jurisdiction, or holding plea of matter not cognizable by them, to award a *prohibition*, though no original plea was therein depending. This right of the *Common Pleas* to grant *prohibition* was solemnly discussed and allowed by all the judges of *England* (b); and *Vaughan* (c) Chief Justice, acknowledges such jurisdiction to belong to it. To this court appertained, as it did also to the court of *Exchequer*, the right at common law, where any suitor of it was imprisoned, to grant the writ of *habeas corpus*; and if he was illegally detained, to discharge him: but if it appeared that he was confined for a *criminal* matter, neither this court, nor the court of *Exchequer*, could proceed to investigate the charge, but were bound to remand him; or else, if the offence was bailable, to take bail for

Common Pleas,
its power and
jurisdiction

over all civil
offences,

or of a mixed
nature.

Of removing
proceedings
from inferior
courts.

Not a court
of error;

but may award
prohibition;

or *habeas cor-
pus*.

(a) Vide *Burr.* 4 pt. 850.

(b) *Mitch.* 7 Jac. 1.

(c) Vide *Vaugh. Rep.* 157. 4 Inst. 99.

his due appearance in a court of criminal jurisdiction (a). And the *Habeas Corpus* Act (b), for the better securing the liberty of the subject, provides, "That it shall be lawful for any prisoner to move and obtain his *habeas corpus*, as well out of the high court of Chancery or court of Exchequer, as out of the court of King's Bench or Common Pleas, or either of them; and if the said lord chancellor or keeper, or any judge or judges, baron or barons, for the time being, of the degree of the coif, of any of the courts aforesaid, in the vacation-time, upon the view of the copy of the warrant of commitment or detainer, or upon oath made that such copy was denied, shall deny any writ of *habeas corpus* by the said act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds."

Court of Exchequer, its power.

How divided.

Of the court of appeal established by Edward 3. in the Exchequer-chamber.

Use thereof.

Of another court of appeal established also in the Exchequer-chamber.

The jurisdiction of the court of Exchequer has been already discussed, as the establishment of it took place long before the reign of Edward the First, though he certainly new-modelled it, when defining and ascertaining the jurisdiction of the superior courts on the division of the power of the great *Aula Regis*. In his time we find the court of Exchequer divided into the court of *Pleas*, the court of *Receipt*, (which is the true center into which the sovereign's revenues and profits ought to fall,) the court of *Accounts*, and the court of *Equity* in the Exchequer-chamber, composed of the lord treasurer, chancellor of the Exchequer, and barons. To these courts King Edward the Third added another, composed of all the judges of *England*, held on account of some difficulty started in a point of law; the jurisdiction of which arises, when the judges of the respective courts of *King's Bench* and *Common Pleas* are equally divided in opinion, or apprehend great difficulty in a case. Whenever this happens, they are directed by the statute 14 *Edw. 3. c. 5.* to adjourn the matter into the *Exchequer-chamber*, to have it argued by all the judges of *England*. Before this statute the record in such cases was adjourned and determined in parliament, which was attended with great inconvenience; but however the same statute ordains, that if all the judges in the Exchequer-chamber are equally divided, it shall be determined at the next parliament by a prelate, two earls, and two barons, with the advice of the lord chancellor, and treasurer, and others of the king's council (c).

In the same reign a court of appeal was also instituted in the *Exchequer-chamber*, for the examination of errors in the

(a) See *Wood's case*, 3 *Wils.* 172.

(b) 31 *Car. 2. c. 2. f. 10.*

(c) See 4 *Inst.* 68. 110. *Co. Lit.* 72. b. and 2 *Bulst.* 46.

Exchequer,

Exchequer, by the statute 31 *Edward the Third*, c. 12. Before the establishment of this court, errors in the *Exchequer* had sometimes been examined before commissioners appointed by the Great Seal, and sometimes in parliament; the uncertainty of which became a considerable grievance to the subject, and therefore Parliament was petitioned, so early as 22d of *Edward the Third*, that the erroneous judgments in the *Exchequer* might be examined in the King's Bench; but this petition for some reasons was then disliked, and therefore not acceded to. But the legislature soon afterwards enacted, "That in all cases touching the king, or
" other persons, upon a complaint of error in the *Exchequer*, the chancellor and treasurer shall cause the record
" to be brought before them, and taking to them the judges
" and other sage persons, shall call before them the barons
" of the *Exchequer* to hear the cause of their judgment;
" and if upon examination error be found, they shall amend
" the rolls, and send them into the *Exchequer* to have execution." This statute however relates only to judgments on the common law side of the *Exchequer*, so that an appeal to this day from the equity side lies immediately to the House of Peers.

Use thereof.

In the reign of Queen *Elizabeth* (a) another court of *Exchequer-chamber* was established, for examining errors in causes originally commenced in the court of King's Bench, which, before that time, used to be examined in parliament. The practice of this, as well as of the other courts for the investigation of errors in causes commenced in the King's Bench and Common Pleas, will be hereafter treated of in the course of this work.

Another court of appeal established in *Exchequer-chamber* by Queen *Elizabeth*.
Use thereof.

To the inferior courts King *Edward* assigned a jurisdiction over all trifling actions, wherein the damage laid did not exceed forty shillings. For by the statute of (b) *Gloucester*, it was enacted, "That none should have *trespass* before the king's justices, unless he swears by his faith that the goods taken away were worth above forty shillings." The construction put upon this statute was, that it was only in affirmance of the common law, and the *trespass* intended was only *trespass on the case*, and that it could not mean *trespass with force*; because no inferior court was empowered to hold plea of *trespass vi & armis*. On this exposition of the statute of *Gloucester*, the case of *Lambard and Thurston* (c) seems to have been decided, which was an action of *trespass, vi & armis*, and damages laid to twenty shillings only: to which

Jurisdiction of inferior courts confined to actions not exceeding forty shillings.

Affidavit thereof.

No cognizance of *trespass vi & armis*.

(a) Stat. 27 *Eliz.* c. 8.(b) 6 *Edw.* 1. c. 3.(c) *Cartb.* 108.

decla-

declaration the defendant demurred, and insisted, that the court of *King's Bench* had no jurisdiction, the damages alleged being under *forty shillings*. But to this objection the court answered, that if trespass *vi & armis* under forty shillings did not lie in a superior court, the party had no redress in such cases, because the *fine* (a) imposed in such action could not be set by an *inferior court*, meaning a court *not of record*.

Affidavit now
disused.

But trifling
causes dis-
couraged by the
different acts
establishing
courts of con-
science.

The affidavit required by the statute of *Gloucester*, previous to the commencement of an action in the superior courts, "that the matter in dispute amounted to forty shillings," has long since been disused in the *King's Bench* and *Common Pleas*, though in the latter, as well as in the court of *Exchequer*, it is still a frequent motion to dismiss the causes of such trifling account, as beneath the dignity of the court. The legislature, however, willing to restore to the inferior courts that portion of jurisdiction originally intended by the common law, and confirmed by the statute of *Gloucester*, and of which they have been deprived by the disuse of the affidavit prescribed by that statute, has by a side-wind endeavoured to revive their consequence by the several statutes made to deprive the plaintiff of the costs of his suit, upon obtaining a verdict in case the damages found by the jury do not amount to *forty shillings*.

As to *maritime* and *military* affairs, and offences committed within the limits of the royal residence, which, with other matters, were cognizable by the *Aula Regis* originally, king *Edward* assigned them, on the division of the courts, to the peculiar superintendence of the *marshal* and *constable*, to whom they were before usually referred.

SECTION II.

Of the increased Jurisdiction of the Court of King's Bench over Civil Actions; their Process to bring the Defendant into Court, and of their Proceedings by Special Original, and the Fine payable thereon.

The court of
King's Bench
originally con-
fined to criminal
offences.

THE court of *King's Bench*, we have seen in the former section, had, on its establishment, an original jurisdiction over all *criminal offences* or *pleas of the crown*, and of such civil matters only as were in *breach of the peace*, and therefore denominated *trespassers*. This appears plainly by

(a) The fine originally imposed in such actions is taken away by the statute 5 W. & M. c. 12. as being oppressive to poor defendants, who were liable to be outlawed for non-payment thereof, being a debt due to the Crown.

the

the treatises of *Britton* and *Fleta*, who wrote in the reign of *Edward* the First, and who describe the jurisdiction of this court in civil matters to be, "to amend false judgments, determine appeals, and other trespasses committed against the peace; & *enconter notre jurisdiction*," which is, says *Sir Edward Coke*, to grant *prohibitions*. Tied up to the trial of criminal offences and trespasses only, the investigation of the erroneous judgments of inferior courts, and the preservation of the due bounds and limits assigned to the respective jurisdictions instituted by the crown, this court found itself left with little or no business to engage its attention: so little indeed, that a few days in term-time sufficed to transact it; and as they did not fit *de die in diem*, continuances of all that was done in each separate matter before them, were entered from the day they sat, till the day fixed for their meeting again. From this small share of employment too, a great part was again taken off by the *Justices in Eyre**, of *Oyer and Terminer**, and *Gaol-delivery**, and the *conservators of the peace* in the country; to which justices in their circuits, the trial of all criminals in the respective counties through which they passed was referred. But it was not long before this court contrived to increase its jurisdiction in civil actions.

Little business.

* See the origin of these Sec. vi.

Soon contrived to increase it.

Causes thereof.

The necessity which had called for the establishment of a constant court in the capital, shewed itself more and more. The particular connection formed with the continent, and the intercourse opened with other countries in *Europe*, had introduced a spirit of commerce amongst the people. Foreigners were permitted to resort here, and carry on trade, without molestation or hindrance. A speedier way for the recovery of debts had been instituted in the reign of *Edward* the First, by granting execution, not only upon goods and chattels, but also upon lands, by writ of *elegit*, which was of signal benefit to a trading people; and upon the same commercial ideas, former restraints upon landed property were taken off, and the charging it in a *statute merchant*, to pay debts contracted in trade, was allowed, contrary to all feudal principles. [See Sect. iv.] These improvements insensibly wrought a wonderful change in the manners of the people. Trade began to be embraced by those orders of men who had formerly looked upon it with an eye of contempt; and while the merchant and mechanic grew rich by the returns of their industry, the nobleman, by endeavouring to surpass the citizen in magnificence, was greatly impoverished; and his tenants oppressed by the slavish burdens imposed on their tenures. In this progress of society, litigations unavoidably increased; the contracts and engagements

Multiplicity of
business in C. B.

ments entered into in trade, the mutual credit necessarily required, the failures of some, and the dishonesty of others, together with the contrariety of opinions and constructions to which their engagements were liable, all conspired to open new sources of dispute. The multiplicity of causes, arising from these various circumstances, required a speedy investigation and dispatch; but the inferior courts were too circumscribed in their jurisdiction to hear and determine the far greater part of them. The parties, therefore, at first, were of necessity compelled to resort to the *Common Pleas* for redress; which occasioned a great disproportion in the business referred to the two superior courts: the one, having a sole jurisdiction over *civil* transactions, became fully employed; while the other, confined to *criminal* matters, pleas of the crown, and the keeping of inferior courts within their proper bounds only, found little or nothing to do.

Court of Ex-
chequer got
cognizance of
civil actions,

The court of *Exchequer*, indeed, had very early drawn some civil actions between subject and subject, not in the least relating to the revenue under their cognizance; and although the statute of (a) *Rutland*, and the statute of (b) *articuli super chartas*, were evidently meant to prohibit them in future from holding plea of *any civil matter* between the people, yet they retained the jurisdiction they had usurped in defiance of them, by conniving at the complainant's *falsely suggesting* that he was a *debtor to the king*; which the plaintiff was not called upon to shew, nor the defendant allowed to dispute. But the judges of the court of *King's Bench* had not, from the particular jurisdiction prescribed to them, or the nature of their process, which we have seen was calculated only for *trespasses*, an opportunity of receiving complaint of any civil matter, or awarding process against the defendant, unless it was for a *trespass*; and therefore could not usurp an immediate jurisdiction over civil matters, as the court of *Exchequer* had done. However, it was not long before an opportunity offered itself of drawing an action, which was merely civil in itself, under their cognizance; and their jurisdiction over that being once established, other schemes were soon devised to enlarge it.

by fiction of
quo minus.

Why court of
King's Bench
could not do
this.

How they after-
wards had an
opportunity,

The *common law* had not provided an effectual remedy for many injuries to which the progress and extension of commerce gave birth. For the contracts made between merchants, and others in trade, were of such various sorts; and men were affected by non-performance of them in such different ways, and such *new* and *consequential* injuries arose,

(a) 10 Edw. 1.

(b) 23 Edw. 1. Stat. 3. c. 4.

to which no writ in the register was properly adapted; that the legislature was forced to provide, so early as the 13th of Edward the First, that, "Whensoever from thenceforth in
 "one case a writ shall be found in the *Chancery*, and in a
 "like case falling under the same right, and requiring like
 "remedy, no precedent of a writ can be produced, the
 "clerks in *Chancery* shall agree in forming a new one;
 "and if they cannot agree, it shall be adjourned to the next
 "parliament, where a writ shall be framed by consent of
 "the learned in the law; lest it happen for the future, that
 "the court of our lord the king be deficient in doing justice
 "to the suitors." In consequence of this statute a variety of new writs were invented; and a suitor who had received an injury to which no writ then in being was competent, had one made out for him according to the exigency of his own particular case. And the action founded thereon was called a *special action of trespass on the case*.

by the introduction of special writs in actions of trespass on the case;

Of this sort of action the court of *King's Bench* contended they had cognizance, and that the *original writ* might, at the plaintiff's request, be made returnable, as well in that court as in the *Common Pleas*; as the action was for a *trespass*, of which they had an original jurisdiction: and though not alleged to be committed *vi et armis*, yet favoured so much of a *criminal nature*, as to make the defendant liable to pay a *fine* to the king, as well as damages to the party complaining. Not contented with a participation of all actions *on the case* with the *Common Pleas*, the *King's Bench* contrived also to share with them the actions of *debt*, *detinue*, *covenant*, and *account*. But as these actions were merely *civil* in themselves, the cognizance thereof could not be obtained in the same manner as the former, by procuring the *original writ* to be made returnable there, nor could it have been maintained (if it had been attempted) in so plausible a manner as the action of *trespass on the case*. So that, to draw these into their court, they were obliged to resort to a fiction, in like manner as the court of *Exchequer* had done. This fiction was by suffering the plaintiff, after having alleged a complaint of *trespass* against the defendant [in order to give the court jurisdiction], to waive his first charge of *trespass*, when the defendant was brought into court, and declare against him for a debt, breach of contract or covenant, detention of his goods, or other matter of a mere civil nature. And to support this new jurisdiction the judges maintained, that when a party was once brought into court, and either in the actual or supposed custody of the *marshal*, he could not be charged, even for any *civil* matter, elsewhere. By this doctrine, they not only got cognizance of that plaintiff's action who had

of which the King's Bench took cognizance.

How extended to other actions,

by suffering declarations in other actions.

on the supposition of defendant being in custody of the marshal.

This jurisdiction became established.

caused the defendant to be apprehended, but also of the actions of others who had liberty to charge him while he remained in such custody (a). And in order to found this jurisdiction, they held that it was not necessary that the defendant should be actually the *marshal's* prisoner, but the plaintiff might presume him to be so, since he was already amenable to the court: and on this presumption it is, that at this day, as soon as the defendant appears, or puts in bail to the process, he is deemed, by so doing, to be in such custody of the *marshal*, as will give the court jurisdiction to proceed; it having been solemnly adjudged (b), that if any person be *in custodia mareschalli*, &c. be it by commitment, or by *latitas*, bill of *Middlesex*, or other process of law, it is sufficient to give the court jurisdiction of any matter referred to them. And to vindicate this, Lord Coke says, "And the rather, for that the court of *Common Pleas* is not able to dispatch all the subjects causes, if the said actions should be confined to that court. And seeing none but serjeants at law can practise in the court of *Common Pleas*, it is necessary, that in this court of *King's Bench*, apprentices and other counsellors of law might by experience enable themselves to be called serjeants afterwards; otherwise, serjeants must want experience, which is the life of their profession." This acquired jurisdiction is now fully established. For, says the same learned writer, "The proceedings in the court of *King's Bench* for so long time, and under so many honourable judges, and reverend sages of the law, have gotten such a foundation as cannot, without an act of parliament, be shaken." Of such an act ever being passed there is not the least probability, since the legislature has, in several instances, confirmed its acquisition. Nor indeed can such an act ever be thought of, since not only the amazing increase of causes, from a wide-extended commerce, requires more than one court to investigate and determine them; but the inconveniences formerly experienced by the frequent removal of this court, have long ceased to be apprehended, and the parties can carry on their cause with equal celerity and cheapness, and find the same justice done them on the one side of *Westminster-hall*, as on the other.

In this manner has the court of *King's Bench* obtained a concurrent jurisdiction, and now holds, as it were, a *divisum imperium*, with the court of *Common Pleas*, over all civil actions of a personal, and some of a mixt nature. Its original jurisdiction, we have seen, of causes between subject and

(a) Which is the foundation of the practice of delivering declarations by the plaintiff, as it is now called.

(b) 31 Hen. 6. 10. b. 4 Inst. 72.

subject,

subject, was only of such as were of a *tortious* kind, as all *trespasses*, *rescous*, or *pound-breach*, actions of *deceit*, *conspiracy*, *forcible entry*, *ejectment*, *replevin*, and *trespass on the case*. Whereas its acquired jurisdiction, or rather that jurisdiction which is by consequence only, as being founded upon the defendant's being in the supposed or actual custody of the *marshal*, comprehends all actions of *contract*, whether express or implied, *debt*, *annuity*, *covenant*, *account*, *case for negligence*, *non-feasance*, *mal-feasance*, *mis-feasance*, and the like.

But this acquired jurisdiction had nearly met with a fatal blow, without any such intention of the legislature, in the reign of *Charles the Second*; when an act was passed (a), requiring the *true cause of action to be expressed particularly in the writ or process*, otherwise the party arrested could only be held to bail for 40*l.* This act was made for the purpose of relieving defendants from being held to bail without knowing upon what ground, no cause being mentioned in the writ, and was not designed to affect the jurisdiction of the courts. But as the *King's Bench* had strictly only cognizance in matters of *trespass*, which word was necessary to be inserted in the process, in order to give the court jurisdiction, and it was not till after the party had been so brought into court, and was supposed to be in their custody, that any other civil action, as *debt* or the like, could be brought against him; a difficulty now arose how this statute could be complied with, which required the real cause of action to be expressed in the writ, whereby the defendant was to be arrested (if to be held to bail for more than 40*l.*). And, indeed, there would have been an end of their investigation of civil actions of any considerable amount, if the court had not hit upon some expedient to save their assumed jurisdiction from being overthrown and destroyed.

To their *bill or latitat*, commanding the sheriff to arrest the defendant to answer the plaintiff in a plea of *trespass*, (provided the cause of action warranted the holding to bail in above 40*l.*) they inserted an *ac etiam* clause, specifying the true cause of action in this manner: "And also, to a bill of the said *A. B.* for one hundred pounds of *debt* (or as the case happened to be) according to the custom of the court of our lord the king, before the king himself to be exhibited, and that he have then there this," &c. as the case was. By this device the statute was complied with, as the true cause of action was expressed in the process to warrant the defendant's insisting upon bail to above forty pounds, and the court still retained its jurisdiction, as the civil matter was

This jurisdiction nearly destroyed, by 13 Car. 2. requiring true cause of action to be in writ.

How guarded against.

Introduction of the *ac etiam*.

Use thereof.

(a) 13 Car. 2. stat. 2. c. 2.

suggested to be only a collateral charge, and not the cause of action for which the arrest was made—which was still the *trespass* supposed to have been committed, of which the court legally had cognizance.

Disputed by C.
Just. of C. B.

This curious device to retain their usurped jurisdiction over *civil actions*, which, if not suggested, was certainly contrived at by Sir *John Keelynge*, the then chief justice of the *King's Bench*, occasioned a strong remonstrance from Sir *John Vaughan*, the then chief justice of the *Common Pleas*. For the judges and officers of the latter flattered themselves upon the passing of this act of *Charles the Second*, that the cognizance of all *civil matters* would again revert solely to their court; the true intent of the act being, as they contended, that there should be a proper *original writ* sued out at the commencement of the suit, in all actions *bailable*, and that the true cause of action should be inserted in it, and its subsequent process: and that the *King's Bench* must of necessity relinquish their usurpation over civil actions not amounting to a *trespass*; because their process of *bill*, which was founded on their original jurisdiction over injuries committed *contra pacem*, was calculated only for such as were denominated *trespasses*. Sir *John Vaughan* frequently endeavoured to dissuade the chief justice from the use of these *ac etiams* in his court, urging, that they were not only in face of the statute, but founded on an allegation (viz. *secundum consuetudinem curiæ*) that was false and contrary to law, there being no such custom to warrant them. But notwithstanding all that Sir *John Vaughan* could say against the use of them, the chief justice of the *King's Bench*, though without a shadow of argument, was obstinately determined not to surrender up the usurped jurisdiction of his court. At last, it was agreed between the two chiefs to discuss the matter before Sir *Matthew Hale*, then *lord chief baron of the Exchequer*, who should preside as moderator between them. This reference turned out very fortunate for the chief justice of the *King's Bench*; for his opponent, in his declamation against the unwarrantable use of these *ac etiams*, happening to go too far for his purpose, in contending that the cognizance of all *civil actions* of right belonged to the *Common Pleas* only, Sir *Matthew* perceived that such argument aimed as well at overthrowing the usurpations of the *Exchequer* as of the *King's Bench*; and that if the *Common Pleas* re-assumed its original jurisdiction, and the ancient boundaries were again set up between the courts, and neither the *King's Bench* nor the *Exchequer* were to interfere in personal actions between subject and subject, the *Common Pleas* would shine with all its former splendour, and leave the other courts with little

agreed to be
referred.

little or no business to engage their attention. Sir *Matthew* therefore begged to decline the umpirage, and left the two chiefs to settle their difference. Sir *John Vaughan* soon afterwards died, and from that time the practice has never been disputed.

Thus has the court of *King's Bench*, by continual usurpations, (if the expression may be allowed,) gradually regained that jurisdiction over civil actions which the *Aula Regis* exercised of old, but which the *Common Pleas* was purposely formed to investigate, and ought strictly to have had the sole cognizance of.

It may be useful to the student, as a summary of what has been said, briefly to point out the ground upon which the various actions in the court of *King's Bench* are now maintained. Of trespasses *vi et armis*, ejectment, replevin, deceit, conspiracy, and the like cases favouring of a criminal nature, they have cognizance by their original jurisdiction. Over actions of trespass on the case, they usurped an authority catching hold of the word trespass mentioned therein; but it was at first only a derivative authority, the original writs out of Chancery in such actions being made returnable in that court as well as in the *Common Pleas*, until the original afterwards grew into disuse. [See Sect. 4.] Over actions of debt, detinue, annuity, covenant, account, and the like, of a purely civil nature, they obtained jurisdiction by mere fiction; first by filing a bill for some ideal trespass in order to bring the defendant into the actual custody of the marshal, (when we find he was amenable to all charges brought against him,) and then declaring in such civil action, and afterwards by supposing him to be in such custody, and proceeding against him in such action in the first instance. In this way they also afterwards proceeded in actions on the case, and discontinued suing out the original. But this jurisdiction is only in such actions when the defendant is not to be held to bail; for where he is arrested for any debt or the like, there the jurisdiction of the *King's Bench* hangs upon the subtle expedient of the introduction of the *ac etiam* into their process.

It is for this reason that it has been doubted whether an action of debt, covenant, or the like, could be brought in the *King's Bench* by special original. And there is certainly some colour for the objection; for although such an original writ might be granted in cases where this court had original jurisdiction of their own, as trespass and the like, in which actions the parties might proceed by bill, or by special original out of Chancery returnable in *King's Bench*; and further, although in another species of action, namely, trespass on

Umpirage declined, and practice continued.

On what grounds court now exercises jurisdiction over the various civil actions.

Original jurisdiction.

Derivative.

Fictitious.

Ac etiam.

Of the objection to an original in debt in K. B.

the case, they had openly usurped a derivative jurisdiction, and such special originals out of *Chancery* were made returnable there; yet they never pretended to any such cognizance over debt or covenant, but only encouraged such actions by a fictitious and bye way of proceeding: and in former times all originals out of *Chancery* in such civil cases were returnable in the *Common Pleas*.

All actions
now, by bill or
original.

But the jurisdiction of the *King's Bench* in this respect, by time, and the undisputed exercise of the right, is too firmly established to be now shaken. All personal and mixed actions (*real* actions being still confined to the *Common Pleas*) may therefore, at this day, be prosecuted in the *King's Bench*, either by bill (the peculiar process of that court) or by special original out of *Chancery*. We proceed to shew the nature of this process by bill, and afterwards by original, and the reason why actions in both courts are now seldom brought by special original.

As to jurisdiction over peers by bill, see *post*.

*Of the Process to bring the Defendant into Court when
the Proceedings are by Bill.*

Supreme power
of K. B.

Original bill.

Bill of Middle-
sex.

A precept.
Effect thereof.

The court of *King's Bench*, from its supreme jurisdiction over criminal matters, immediately upon its coming into any county, (for it always followed the king,) superseded the ordinary administration of justice by the general commissions of *Eyre*, and of *Oyer and Terminer*, and all parties who had received any injury, accompanied with force, had liberty to apply to it for redress. This was done by the plaintiff drawing out his complaint, and which must have alleged a trespass, and entering it on the records of the court, this was called the original bill, or bill of trespass. The clerk of the court then issued a peculiar species of process, intitled a bill of that county in which the court happened to be sitting, now called the bill of *Middlesex*, which is signed with the name of the chief clerk to enrol pleas in the court; namely, *Mansfield* and *Way*; and the words "By Bill" are subscribed, signifying that the action is by bill, and not by original; which bill was always first actually filed; and is still supposed to be filed. This second bill was directed to the sheriff of the county, the proper officer to execute the king's writs; but this was rather a *precept* than a writ, as it was not *tested*, which writs are. The sheriff was thereby commanded to take the body of the defendant, and have it on a certain day mentioned therein, in court, *whereforever the lord the king should be in England*; for as the court was ambulatory, no certain

certain place could be mentioned. If the sheriff apprehended him, he kept him in custody, and produced him in court on the return-day; it was at his peril to let him go at large. [See Sections 4 & 5.] He then made a return *cepi corpus*. But if he could not find him in his county, he returned *non est inventus*; and another bill, called a *testatum* bill, issued to the sheriff of such other county where it was likely for him to be found, reciting the former bill and return, and commanding the sheriff of the latter county to take him; this afterwards was called the *latitat*; and instead of suing out the bill of Middlesex, it became the practice, for expedition sake, to sue out the *latitat* in the first instance, and to suppose that the bill had previously issued, the form thereof of reciting such bill still continued with a little variation as to the day when it was returnable; for as no such day existed in fact, it was dangerous to specify any; it stated it generally, therefore, *at a certain day now past*. If the defendant was not taken upon the *testatum*, an *alias* and then a *pluries testatum* issued, and so on, to the same effect as the *alias capias* and *pluries capias* at this day, if he is not taken upon the *latitat*. If the defendant had fled into a liberty, and upon a warrant from the sheriff to the bailiff of the liberty nothing was done, the sheriff returned *mandavi ballivo, &c. et nullum dedit responsum*, and there then issued a writ to the sheriff, not to omit taking the defendant notwithstanding the liberty called a *non omittas* writ. When the defendant was taken, he was kept in custody till the return of the writ, he was then brought into court, and delivered over to the care of the king's marshal, earl marshal, or steward of the household, who had the custody of all the prisoners in the court of King's Bench, and detained them in the Marshalsea prison. From the office of earl marshal was derived that of the present marshal of the King's Bench prison, about the reign of James the First.

When the defendant was thus in custody, he was suffered to put in bail, to stand the event of the suit, at the discretion of the court, or was brought up from time to time by the marshal till the matter was finally heard and determined. The plaintiff then delivered his bill or declaration, which was nothing more than a copy of the original bill; and the defendant answered thereto, and the plaintiff replied, and so on *ore tenus*, the whole of the proceedings being carried on *viva voce* in court; which practice continued till after the Reformation. [See Section 6.] But from the 13th Edward the First, the defendant was at liberty to attend the court by his attorney, whereas before that time he was obliged to be present in person.

Return thereof.

How if defendant not found.

Testatum bill.

Latitat.

Alteration therein.

Alias, pluries testatum.

Capias. Non omittas.

How when defendant taken.

Of the office of marshal.

Declaration.

Proceedings ore tenus.

When attorney allowed.

Necessity of
original bill on
error brought.

How allowed
to be filed.

It has been observed that it gradually became the practice, which still continues, of suing out the bill of Middlesex or *latitat* in the first instance, without any original bill, or bill of trespass, previously filed. But still it was supposed to have been filed; and the want thereof was cause of error, if a writ of error was afterwards brought. The court, therefore, in order to protect such judgments grounded upon a fiction they themselves connived at, permitted the plaintiff, in case a writ of error was brought, to file his *bill* of complaint; and, if necessary, to get the precept or bill of Middlesex returned as if regularly done at first, provided he did it before errors were assigned, but not afterwards. And this is even now necessary, where a writ of error is brought after judgment by *default*, but not after verdict. The want thereof in the latter case being cured by statute of Elizabeth.

Of the Proceedings by Original in K. B. and of the Fine payable thereon.

It has been already shewn, that actions may be brought in the *King's Bench* either by bill or special original out of *Chancery*. If the latter mode be adopted, the proceedings are the same as in the court of *Common Pleas*; the whole of whose jurisdiction is derived from such original writs, which are either actually, or supposed to be, sued out and returnable therein.

Use of proceeding
by original.

In some cases it is useful to proceed in this court by *original*: first, if the party absconds and the plaintiff wishes to outlaw him; for no outlawry lies upon any other process; and secondly, if defendant is likely to bring a writ of error; in which case he must, in the first instance, carry the record from this court to the House of Lords, which is too serious a matter merely for delay, whereas in proceedings by bill he may bring a writ of error in the Exchequer-chamber.

Proceedings also against a peer of the realm should properly be by *original*, otherwise the defendant may plead in abatement; but if he does not then take advantage of it, it is too late afterwards to set the proceedings by *bill* aside. *Earl of Lonsdale v. Littleton*, 2 H. Bl. Rep. 267. 299.

Of the fine payable
thereon.

But the great objection against commencing a suit by special original is the fine, which in all such cases is payable to the king, the nature of which it may be useful to explain; and in so doing it may be proper to take notice as well of the *fin*es formerly payable by the suitors in the superior courts, as of those which continue to this day to be exacted from them

by

by the crown. All *fin*es and *amerciaments* (a) (says *Bracton*) *Fin*es belong to the king. belong to the king, as *fin*es upon original writs, and *fin*es *pro* *licentia concordandi*: and the reason is, because courts of justice are supported at his charge; and whenever the law puts the king to any charge for the support and protection of his people, it provides him money for that purpose, which is called *vestigal judicorum*. *Fin*es were originally of several sorts (*Beecher's case*, 8 Co.): some in nature of an exaction by the king, upon giving leave to a subject to prosecute a suit in his superior courts; others in nature of a penalty set on offenders after conviction, and on plaintiffs failing in their suits; on parties making false claims; or for fraud and deceit to the court; for vexation under colour of law; for contempt against the king's writs or statutes. Others again in nature of an imposition set by the court on the suitors, with a view to enforce plainness and perspicuity in pleadings. These latter were imposed even in the inferior courts, till the statute of *Marlbridge* (52 Hen. 3. c. 11.) provided, "that neither in the circuit of justices, nor in counties, hundreds, and courts-baron, any fines shall be taken of any man *propulchre placitando*, or *beaupleading*." Which statute was further enforced, and made to extend to the superior courts also, by the statute *Westminster* the first (3 Edward 1. c. 8.). But the former species of *fin*es have been suffered to continue. And they were formerly of money, or other things, as money was exceedingly scarce. Sir *Matthew Hale* gives an instance of a *fine* paid at the commencement of a suit between the men of *Yarmouth* and *Hastings*, in the reign of king *John*, in these words, "*asserunt domino tres palfredos, & sex asterias narentes ad inquisitionem habendam per legales*," &c. which *fine* we see was of three state-horses, and six herons or egrets. So exorbitant were the *fin*es upon original writs, exacted from the subject in the reign of this king, whose misfortune it was not to know in what manner to use his prerogative, that they made one amongst the many complaints of the times, and seem to have occasioned the 44th article in the great charter; wherein the sovereign expressly stipulated in these words, "*nulli vendemus, nulli negabimus, nulli differemus justiciam vel rectum*." But notwithstanding this concession, *fin*es did

(a) The difference between a *fine* and *amerciament* is this, an *amerciament* is ordered by the court, but assessed by the jury; but a *fine* is not only ordered, but assessed by the court. And as for *amerciaments* which are ordered and assessed by the court upon officers who are in contempt or in default of their duty, these seem to be rather *fin*es than *amerciaments*, though they are commonly so called: and yet it hath been held, that where a pecuniary penalty is assessed by the court upon an officer, it is properly an *amerciament*, but when on a stranger, it is a *fine*.

not cease to be required from the subject, upon obtaining leave to sue in the king's courts. For the sovereign's right to exact *finēs* in such cases was not at all in dispute, the barons only meaning to guard by the charter, that they should hereafter be imposed with moderation: having regard to the importance of the action, and ability of the party; as in criminal cases the court always considers, as well *qualitatem delinquentis*, as *quantitatem delicti*, as directed by the statute of *Westminster* the first, ch. 6. In consequence therefore of this provision in *magna charta*, the payment of *finēs* was put on a regular footing, and as they were reduced to a certainty instead of being *ad libitum* of the sovereign or his chancellor, and not so excessive as before, they were agreed to without any great hesitation.

Fines became afterwards fixed.

Of the time of paying it.

When on commencement of suit.

When after judgment.

Of the *capiatur pro fine*.

Fines gave rise to the joinder in action.

As if they occasioned different judgments.

With regard to the time of paying the *fine*, and of whom it should be exacted in civil actions, there was a distinction. For if a plaintiff sued for a *debt*, and took out the *precipe quod reddat*, he paid the *fine* immediately to the *curfitor* in proportion to his demand. And here the *fine* could be taken at first, the plaintiff having ascertained his demand, for which the *curfitor* could easily apportion the sum due for the *fine*; which sum is mentioned, ch. 5. sec. 1. But if he took out a *pone*, or *si te feceris securum*, with a view only to recover a satisfaction in general, the *fine* could not be taken at the first; because the intervention of a jury was necessary to ascertain the plaintiff's demand. And as this was the proper writ for *trespass*, and consequential injuries arising from the neglect or deceit of the defendant, he was to pay it, and the amount of it was to be regulated by the damages given in the judgment; and an award of the writ of *capiatur pro fine* in such cases was entered up after the judgment, in this manner, "*Et predictus defendens capiatur.*" A similar entry was also made, and a like writ issued, in all cases after a judgment in the *King's Bench* in a suit there by *bill*, which was the process of that court for *trespasses*, and such like injuries committed *contra pacem*, for which a *fine* was always payable.

From the nature of these *finēs*, and manner of taking them, arose the *joinder in action*, as it is termed in our law books. For all matters of debt, which the plaintiff had against the defendant, could be put in one and the same writ, because the *fine* could be taken at once by the *curfitor* upon making out the writ. But the plaintiff could not sue for a debt, or specific demand, and a *trespass* or other consequential injury, by one and the same writ; because the *fine* for the *debt* was payable at first by himself, and for the *trespass*, after the suit was determined, by the defendant: the amount whereof could

could not be known till it was imposed by the court, and the court could not impose it till a jury had ascertained what damage, injury, or vexation the plaintiff had sustained. Besides, the judgments in *debt* and in *trespass* were different; for after a recovery in an action of debt, there was also a judgment *quod sit in misericordia*, for the *amerciament* (a), which was to be assessed in the county; whereas in *trespass*, after the recovery of damages, there was a judgment *quod capiatur* for the *fine* to the crown. Nor could *trespass* and *trespass on the case* be joined in one and the same writ; because, as the first favoured of a *criminal* nature, there was a *quod capiatur*; and as the last was only a *civil* injury, a *quod sit in misericordia* was entered.

When it became the practice for plaintiffs in personal actions immediately to sue out the writ of *capias quare clausum fregit*, in order to arrest the defendant, and thereby sooner compel an appearance [for which see Section iii.], they avoided in great measure the paying of the *fine* to the crown. For upon a *capias* no *fine* was exacted; because the writ was supposed to issue for a *trespass*, though the court winked at a plaintiff's declaring in *debt*, *covenant*, or the like action, when the defendant was brought into court. And when the statute of 13 Car. 2. was made, requiring the true cause of action to be expressed in the writ to hold the defendant to bail in above *forty pounds* upon the arrest, the plaintiff had still an opportunity of avoiding the *fine* upon suing for a *debt*, (unless he intended to proceed to *outlaw* the defendant,) because he could shew his true cause of action by inserting an *ac etiam* clause in a *capias*. And though in fact a *debt*, or other matter of contract, was his only cause of action, yet it was considered but as a collateral charge, for the defendant was in fiction of law arrested for a *trespass*; and the *ac etiam* clause was for nothing more than to shew the true cause of action, and point out to the sheriff to what amount he might insist upon bail. The *fine* therefore was only paid by the plaintiff when he actually sued out a *precipe quod reddat* for a *debt*, or a *precipe* for a sum certain upon *covenant* broken, or *pone* for a sum certain on promise, which was never done, nor is it often done at this day, unless it is apprehended the defendant will be litigious, or is difficult of access, and has property which the plaintiff can reach by proceeding with a view to outlaw him.

How payment
of fine avoided.

(a) As to *fin*es and *amerciaments*, and when and by whom *amerciaments* shall be assessed, vide *Grieffy's case*, 8 Co.—and *Beecher's case*, *ibid*.

If the defendant was a duke, marquis, earl, viscount, or baron, the *amercement* was to 100 *shillings*, which was the greatest *amercement*; but if he was a gentleman or common person, it seems that it was assessed in proportion to the nature of the demand against him, and his apparent ability to pay it. Vide 6 Co. 45, and authorities there cited in the margin.

In case however a *writ of error* should be brought upon a judgment by default in an action of debt prosecuted by a common *capias quare clausum fregit*, or a *capias* with an *ac etiam* in it, the plaintiff, if he would protect his judgment, and prevent the want of an *original writ* from being assigned for *error*, must sue-out a real original writ in *debt*, adapted to the action he prosecuted; on which the *curfitor* will then apportion and take the *fine* from him, otherwise the judgment must be reversed; because it would appear to be in *debt*, when the process was for a *trespass*. But in case no writ of *error* should be brought on such judgment by default, then the plaintiff need not purchase any such *original writ*, and consequently the *fine* will be avoided. Nor need he purchase it after verdict, as then the error is cured. 18 *Eliz. c. 14.*

The actual *amerciamment* of the defendant after a judgment against him in *debt*, *covenant*, *case*, and the like actions, has long since been discontinued, though the form of awarding the writ continues in the entry of the judgment to this day. And the *capiatur fine* in actions of *trespass*, *ejectment*, and other actions favouring of a criminal nature, as it was oppressive to poor defendants who might have been *outlawed* for not paying it, or, if ever recovered, being seldom accounted for in the *Exchequer*, was taken away by the statute 5 *W. & M. c. 12.* and instead thereof the plaintiff is directed to pay the sum of 6*d.* 8*d.* to the *master* or *prothonotary* at the time of signing the judgment, which is afterwards allowed the plaintiff again when he comes before them to have the costs of his suit taxed against the defendant. So that the writ of *capias pro fine* has fallen into disuse.

Before the statute 5 *W. & M.* when the *fine* was pardoned, the judgment in the *King's Bench* was entered *nihil de fine quia pardonatur*. And since that statute, judgment is entered up in that court without taking any notice of the *fine*. But in the *Common Pleas* after the statute, they entered up judgment upon the statute, thus, *nihil de fine quia remittitur per statutum* (a).

SECTION III.

Of the original Process of the Court of Common Pleas, and the Alteration therein; and of the Pledges to prosecute.

Origin of jurisdiction of C. B.

THE court of *Common Pleas* possessed no original jurisdiction. The justices were merely substitutes of the crown,

(a) *Vide Solt. 54.*

acting

acting under a delegated authority, and having cognizance of such matters only as were particularly submitted to them. All proceedings therefore were brought into the court of *Common Pleas* by virtue of the king's original writ, which was purchased by the party suing, and obtained from the high court of *Chancery*, the grand repository of all original writs. They were made out by the proper officer, called the *curfitor*, (from the words *de cursu*, such writs being grantable of course,) and were adapted to the nature and exigency of the case. They were made returnable in the court of *Common Pleas*, and thereby gave the court jurisdiction over the cause. All subsequent writs, called *judicial writs*, issued from that court. This was the way that causes, of above 40*s.* value were commenced in the county courts before the establishment of the *Common Pleas*, viz. by original writ out of *Chancery*; for the county court had no original jurisdiction in matters exceeding 40*s.*: and as the *Common Pleas* was intended to be a higher court in civil cases than the county court, it in a great measure was governed by the same practice, and adopted the same process. It was for this reason that *pledges* to prosecute used to be returned on the original, in pursuance of the practice of the county court, which originated in the old law of *Frankpledge* as established by king *Alfred*, and which still prevailed in all the kingdom.

All proceedings
by original writ;

where got, and
how returnable.

Intended as a
superior court
to the county
court.

Practice of that
court adopted.

When an original was applied for, a short note called a *præcipe* or *pone* was given to the *curfitor*, describing the names and additions of the parties, and the nature of the writ required, according as it might be a *præcipe* or *pone* wanted.

Of the præcipe
for original.

Original writs were mandatory letters from the king, sealed with the seal in the chancellor's custody, and directed to the sheriff. They were in their nature two-fold, *optional* and *peremptory*; and were called by the names of a *præcipe* *quod reddat*, and a *si te fecerit securum*, or for shortness a *pone*.

Nature of ori-
ginal.

Their kinds;

præcipe,
pone.

The *præcipe quod reddat* was the proper writ when the plaintiff's action was for a specific thing; as for the recovery of a debt certain, or for the restoration of such a chattel, or for giving up such a house, or so much land, specifying the nature and quantity of it. By this writ the sheriff was commanded to summon the tenant or defendant to appear at *Westminster*, at such a day in term. But before the defendant was made acquainted with this writ, the sheriff was to take *pledges* from the plaintiff to prosecute his suit with effect, if he had not already found them in *Chancery* upon suing out the writ. These *pledges* were in those days real and responsible people, and not merely nominal, as of late; and the taking of them was usually entrusted to the sheriff, as he

Use of præcipe.

best knew those in his bailiwick, and was to collect the *amerciament* set on them, if the plaintiff did not prevail in his suit; and if they could not answer the *amerciament*, the sheriff was liable to the king for their insufficiency. At the day specified in the writ, or within a day or two after, the sheriff returned to the court of *Common Pleas* what had been done in pursuance of it; and if the defendant disobeyed the sheriff's verbal monition, he returned as well the names of the *pledges* found him by the plaintiff, as the names of those by whom the defendant had been warned or summoned to appear.

Use of pone.

The *fi te fecerit securum* was the proper writ when the plaintiff only sought a recompence in damages from the defendant for some injury done by him. This writ authorized the sheriff, if the plaintiff made him secure to prosecute his claim, to put the defendant by *safe gages and pledges* to appear at *Westminster* at the return, to answer the plaintiff's charge contained in the writ. In this case, if the defendant could not find *pledges* of sufficient responsibility for his due appearance in court, the sheriff was authorized to take *gages*, that is, some of his goods and chattels into his custody, the better to compel his attendance. Whatever he did therefore in consequence of this writ, he returned to the *Common Pleas*. But so tender was the law in those days of the liberty of the subject, that upon neither of the above writs could the *person* of the defendant be molested; nor indeed in any action, unless for some tortious act committed *with force*, and consequently in breach of that peace which his allegiance and duty required him to keep and preserve.

No taking of defendant's person.

Process by summons and distress.

The process therefore to compel an appearance to these writs was by summons and distress infinite.

If the defendant was to be found, the sheriff summoned him to appear in the *Common Pleas* according to the exigency of the writ, either by personal service of the summons, or by leaving it at his house or place of abode, and then returned the writ accordingly *summoneri feci*.

If the defendant was not to be found in the county, or had no house or land whereon he could be *summoned* or warned to appear, (for in real actions a warning on the land by erecting a white stick or wand was sufficient,) the sheriff returned the writ indorsed with a *nihil*, or "*nil habet in balliva*" "*mea per quod summoneri potest*," that the plaintiff might sue out process elsewhere against him.

When the *original writ* was returned to the court of *Common Pleas*, the court thereby became possessed of the cause, and all further process relating thereto issued from thence.

Fine allowed on summons.

If the defendant had been *summoned*, and did not appear there within

within *four days*, the *quarto die post* of the return of the writ, or send an *essoin* or sufficient excuse to the court why he could not attend, the plaintiff was at liberty to take out a further process against him. Of the *essoin* we have already had occasion to speak in the introductory observations; at present let it suffice to say, that these intermediate days were allowed *ex gratia* by the court, and partly arose from an idea entertained by our ancestors, that it was beneath the dignity of a *free man* to appear or do any other act at the precise time for that purpose appointed, and partly from a consideration of the court, that some unavoidable accident or other might happen to occasion a delay, though the party did not mean to send an excuse, and had no intention to disobey the king's writ.

The next process which issued from the court of *Common Pleas*, upon a disobedience to the original writ, was called an *attachment*, and though it could not actually be sued out till the *quarto die post* of the return of the original, might yet bear *teste* on the very return-day of that writ.* The writ of *attachment* commanded the sheriff to put by safe *gages* and *pledges* the defendant, so that he appear at *Westminster* on such a day in term. These *gages* were again forfeited, and his sureties also amerced in case of his non-appearance within the *quarto die post* of the return of this writ of *attachment*, unless he had sent an *essoin* in time to excuse his default. For the meaning of the *quarto die post*, see introductory observations, under letter B. 4.

The subsequent process to the *attachment* to compel an appearance was a writ of *distringas*, which bore *teste* on the very return-day of the writ of *attachment*, though not actually sued out till the *quarto die post* inclusive of such return; and if the defendant again made default, a like writ might issue *ad infinitum*, commanding the sheriff to *distrain* the defendant from time to time; which was done by taking his goods, and the profits of his lands, called *issues*, which were all forfeited to the king if he did not appear. And here by the *common law* the process determined with the most contumacious defendants in all civil injuries that were not accompanied *with force*; the defendant being gradually stripped of his substance, if he had any, by repeated distresses, till he rendered obedience to the writ: and if he had no substance, the law then considered him as incapable of making satisfaction, and therefore looked upon all further process as nugatory.

Thus then the only process in ancient times to compel an appearance was by summons, and distress infinite, except in actions of trespasss *vi & armis*, and those favouring of a breach

breach of the peace, as deceit, conspiracy, and the like, which as they were looked upon of a more heinous nature, the law allowed a more compulsory process, and suffered the sheriff to serve the person of the defendant, and imprison him till the return-day, when he might bring him into court. This was done by a writ or process called a *capias ad respondendum*. But this did not issue in the first instance, there was still an original writ, and the *capias* was only the process on such writ instead of the summons and distress. It was therefore made out conformable to the original writ before sued out, and returned and bore *teste* on the return-day of that writ: the *capias* being only a process of the court grounded on the contempt upon disobedience to the original. It issued therefore under the private seal of the court of *Common Pleas*, and not under the great seal of *England*; and was tested not in the king's name but in that of the chief justice only; and was denominated a *judicial writ*, as all other writs were, subsequent to the return of the *original*. But this process of the *capias* was gradually introduced, and allowed in other actions beside those of trespass *vi & armis*, and the like, as will be shewn in the next Note; and as it was found a more summary and effectual mode of compelling an appearance than the process by distress, and more especially as an alteration afterwards took place in the practice of the court of *Common Pleas*, by permitting the *capias* to issue in the first instance without any original writ actually sued out, (which will be also shewn in the next Note,) the process by *capias* became generally adopted, and the old process fell into disuse; still however it is at the option of the suitor, either to proceed by original *quare clausum fregit*, summons and distress, or by *capias*; and as the former mode is at this day frequently adopted where the defendant has goods, but cannot be met with, from the convenience of *personal service* not being required upon the summons, which it is of the *capias*, I have endeavoured to explain the origin and meaning of this method of proceeding, and to shew, that however novel it may appear to the practitioner, it is in fact the ancient process revived, and known to our law in many actions long before the process by *capias*. The mode of proceeding by original *quare clausum fregit* and summons is shewn, chap. 5. sec. 2.

Of the Pledges for prosecuting.

As it has been observed, that in former times the sheriff was to take real *pledges* from the plaintiff for the prosecuting of his suit; and, as even in these times the form is adhered to

to of putting *pledges* to prosecute to the original writs in *C. B.* and to the bill or declaration in *K. B.* it may be useful to the student to add a few words upon the origin of this practice, and how it has substantially fallen into disuse, the shadow of it only, and indeed barely that, being now preserved.

The finding of *pledges* was an institution of the great *Alfred's*, who classed the whole people in *decennaries*, consisting of ten families each, and those numbered in each *decennary* he made the mutual and standing *pledges* for each other's due obedience to the laws, and preservation of the public peace. No one by his establishment could prosecute any civil action whatever, unless he could find two or more of the same *decennary* as *pledges*, to satisfy the court that he had a real cause of complaint, and was not of a litigious and quarrelsome temper. And as the defendant was to be put to some trouble and expence in contesting the suit, these *pledges* were always required of the plaintiff immediately upon his complaint to the court. The smaller arrangement of the people in *decennaries* soon falling into disuse, from the difficulty there was of enrolling every subject, and classing those foreigners who casually resorted here to carry on trade, and had no fixed habitations in *England*, it was thought sufficient if the plaintiff upon commencing a suit, and the defendant upon being cited to appear to it, found *pledges* of the same hundred or county with himself. The finding of *pledges* was so reasonable an institution, and so well calculated to prevent both vexation and delay, that in the various revolutions of the government, from *Alfred's* time till long after the reign of *Edward the First*, it was never once discontinued or abolished. Upon the division of the courts, however, in his time, when their several jurisdictions were ascertained and established, an alteration took place with regard to the time when the plaintiff's *pledges* for prosecution should be found, and by whom they should be taken. If the plaintiff sued by original writ returnable in the *Common Pleas*, his *pledges* were usually found in the country and taken by the sheriff, before even the defendant was summoned to appear to the action, and their names were returned by the sheriff upon the original. But in the *King's Bench*, when a plaintiff filed his bill of complaint against the defendant for a *trespass*, (for otherwise that court had not cognizance of it,) they did not always require him to find his *pledges*, before the process went forth to the sheriff to bring in the party; because, as that court was ambulatory, and followed the sovereign, the plaintiff might not have his *pledges* at hand, or be known to any one in the county where the court at that time happened to

Introduction of
pledges.

Reason thereof.

Of the time
when they were
to be found.

Difference as to
the time in
K. B. & *C. B.*

be sitting. Besides, it was imagined, that one who had committed a *forcible injury* in breach of the peace was likely to avoid being taken, as the commission of such an injury made him not only liable to pay a *fine* to the king, as well as damages to the plaintiff, but also subjected him to an imprisonment before trial or conviction. The court of *King's Bench*, therefore, did not as formerly insist upon having the *pledges*, before process was awarded to bring the defendant into court; because if they had waited till the plaintiff could have produced them, it would not only have occasioned a causeless delay to the inquiries of justice, but have given an opportunity for the defendant to effect an escape, and avoid the most diligent search of the sheriff.

Which is the reason why they are put to the declaration in K. B. and not in C. B.

But when the defendant was apprehended or brought into court by the *bill*, or its subsequent process, the plaintiff was called upon for his *pledges*; and if they were not produced when he came to declare, the defendant might have demurred or pleaded in abatement, for he had no occasion to make any defence till they were found. So that, when pleadings *ore tenus* in court were disused, and came to be entered in writing by the clerk, and copies thereof made out for the parties, the names of the *pledges* for the prosecution were always entered in this court at the end of the declaration, that being the stage of the suit in which they were obliged to be found on the process by *bill*; the form of which entry, though the finding of real and responsible *pledges* has long since ceased, continues to be used to this day. But in the *Common Pleas*, the names of the *pledges* were not inserted at the end of the declaration, because they were required immediately upon the *original*, and had been inserted therein, and therefore had no need to be mentioned again when the plaintiff came to count on his writ.

Of the amercia-
ment of the
pledges.

Estreating
thereof.

If the plaintiff failed in his suit, his *pledges* were *amerced* by the court, and the entry thereof in the judgment was, "*Ideo consideratum est quod prædict. quæren. & pleg. sui de prosequend. sint inde in misericordia*," &c. but without taxing them at any sum certain. After which the *amercia-ment* was *estreated*, then delivered to the clerk of the assize in the circuit, who afterwards delivered the same to the *coroner* of the county, who *assessed* (a), that is, assessed the *amercia-ment* according to the nature and proportion of the vexation, and the ability of the party. And that assessment by the coroner was held a satisfaction of the statute of *magna charta*, which provided that "*nulla prædictarum misericordiarum po-*

(a) Vide 8 Co. Griefly's case, and 1 Lord Raym. 380.

"nature,

“ *natur, nisi per sacramenta proborum & legalium hominum de vicineto. Comites autem & barones, non amercientur, nisi per pares suos & non nisi secundum modum delicti.*”

Sheriffs in time growing remiss in their duty, allowed of any persons as *pledges*, sometimes returning the names of fictitious persons as *pledges*, at others, neglecting to require or return any at all. And though the want thereof might have been taken advantage of by demurrer, plea in abatement, or assigned for error; yet the courts, in their liberality, sooner than the plaintiff should be delayed, or that their judgment should be liable to be reversed for so frivolous an objection, which did not affect the right of the suit, would suffer the plaintiff to find them at any time pending the suit, and enter their names as if really found at the proper time to the sheriff or court. And the legislature, to supply the want of real persons as *pledges*, and recompense the defendant where he has been unjustly or vexatiously sued; has, by various statutes, either given him the costs he has incurred in making his defence, or else deprived the plaintiff of recovering those costs he is entitled to by law, in cases of obtaining a verdict, by leaving it to the judge at the trial to certify on the record, that he had little or no cause of action. Since these statutes for allowing the defendant his costs, where the plaintiff fails, or is nonsuited, the writ to the coroner to affect the *pledges* has fallen into disuse, and two ideal persons, *John Doe* and *Richard Roe*, have become the ready and common *pledges* of every suitor. The want however of their names upon the *bill* or *original* was not aided till the statute 16 & 17 Car. 2. c. 8. though a verdict had been had for the plaintiff. But for the better removal of this ground of objection, it was further enacted by the 4 & 5 Ann. c. 16 “that no exception shall be taken for default of *pledges* on the declaration or bill, unless it be shewn for *cause of demurrer.*” And since this last statute, on a *special demurrer* for want of *pledges* on a declaration by *bill*, the court, notwithstanding, gave judgment for the plaintiff; holding, that he might enter them any time before judgment, because *pledges* are not liable until judgment, and not even then if it be given for the plaintiff. Nor can the want of *pledges* now be taken advantage of in *error*, though judgment pass by default; for since the above statute of queen *Anne*, the want thereof is but matter of *form*.

How fictitious
pledges introduced.

Allowance of
costs to defendant
taken away
use of pledges.

Even the form
has now in a
great measure
vanished.

SECTION IV.

Of the Arrest in Civil Actions.

At common law
no arrest except
in trespass.

Principle there-
of.

What was the
mesne process.

Same practice
at the time of
feudal system,
why.

Causes of al-
teration therein.

In the early ages of our constitution, so great a regard was paid to the liberty of the subject, that no arrest or detention of the person was allowed in any civil case whatsoever, except in an action of trespass *vi et armis*. The principle by which our ancestors in this respect were governed was, that as all debts or breaches of contract could only be an injury or loss to the personal estate of another; so nothing but the goods or personal estate of the debtor or offender should be liable to make satisfaction. The *mesne process* therefore to bring defendants into court to answer to the charge, was by *distress* on their chattels; and when judgment was obtained, their chattels only could be taken in *execution*. But if any actual assault or trespass was committed upon the person or property of another, and thereby a breach of the public peace was occasioned, which it was the bounden duty of all to preserve, such an offence was deemed a forfeiture of that personal protection to which the offender would otherwise have been entitled; and upon a charge of this kind, being rather of a criminal than a civil nature, his body was liable to be arrested in the first instance, and after judgment to be detained in execution.

The same practice continued for some time after the introduction of the feudal system by William the Conqueror; but perhaps an additional reason may be given why it should prevail under that form of government. The very essence of that system was, that both the *lands* and *person* of the tenant were answerable for the duties to his lord. No alienation of the former was permitted without the lord's consent; and the latter was obliged, if called upon, to attend the king in his wars; or when at home, to serve his lord according to the nature of his tenure. Neither the one nor the other therefore could be subjected to the payment of debts, the laws being at that time calculated and framed for a nation bred to warlike achievements.

But in progress of time, real property gradually became unfettered, alienations were in some measure allowed by the great charter without acquainting the lord, population increased, trade began to flourish, commerce was introduced, merchants grew respectable in character, and of consequence in the state; dealings between men became extensive and complicated; the wide field of credit, the very life of commerce,

merce, opened itself; the complection of things were altered, towns rose from their insignificance into importance; and wealth, the natural fruit of industry, which poured in upon the cultivation of arts, manufactures, and science, soon elevated the middling class of people; whilst poverty, the sure attendant of prodigality, depressed, and at length proved fatal to the haughtiness and superiority of the powerful barons.

So great a revolution in the manners of a people necessarily occasioned a change in the government and laws of the country.

The extension of trade and commerce was soon found so important to the well-being of the state, that it was deemed expedient to give every encouragement and protection to the industrious trader, and to enforce, as much as possible, honesty and punctuality in the payment of debts and the observance of contracts. To effect this, it was found necessary to extend the law of arrests to civil cases, and to render *lands* liable to the discharge of debts, as otherwise the fraudulent debtor had the means of escaping justice by secreting personal property not his own, and living upon landed property in defiance of the very creditor to whom he was indebted for the identical money with which he purchased it; at the same time, as will appear from the following acts of parliament, the legislature proceeded step by step, cautious of making any unnecessary sacrifice of the personal freedom of the subject.

The first statute of the kind was in the fifty-second year of the reign of Hen. 3. called the statute of Marlbridge, and was in aid of the barons, who had frequently experienced the fraud of their bailiffs in absconding with their rents, and leaving no property behind them to make satisfaction. It enacts, "That if bailiffs, which ought to make account to their lords, *do withdraw* themselves and have *no lands nor tenements* whereby they may be distrained, then they shall be attached by their bodies; so that the sheriffs in whose bailiwick they be found shall cause them to come to make their accounts." But any freehold estate in his own right, though not sufficient to satisfy the demand, took the case out of the statute; so also, if he did not withdraw himself, and if the bailiff was arrested wrongfully, he might have his remedy against the lord by action. 2 Inst. 144.

The next statute was in protection of the merchants, made in the 11th year of the reign of Edward the First, and called the statute of Acon Burnel, the parliament at that time being held there. It recites, that "forasmuch as merchants, which heretofore have lent their goods to divers persons,

Arrest in civil cases necessary to protect trade and credit.

Different statutes authorizing the arrest.

Statute of Marlbridge, 2 Hen. 3.

Allowing arrests of bailiffs in certain cases.

Statute of merchants 11 Edw. 1. 13 Edw. 1. Arrests allowed in favour of merchants;

" be fallen in poverty, because there is no speedy remedy
 " provided whereby they may shortly recover their debt at
 " the day of payment; and for this cause, many merchants
 " do refrain to come into the realm with their merchandize,
 " to the damage of such merchants and of the realm;" and
 it then gives a power to the merchant of bringing his debtor
 before a magistrate, and getting his debt acknowledged, and
 after the day of payment suing out process against his prop-
 erty; and if that was not sufficient, to *take his body*. But
 as this statute was not much enforced, in the 13th year of
 that king, another statute was passed of a much more rig-
 orous nature, reciting the former, and giving further powers
 of selling the *land* of the debtor by a reasonable *extent*, and
 to imprison him till satisfaction made.

and lands al-
 lowed to be
 sold.

The two last-mentioned statutes form one law called the
 Statutes of Merchants.

23 Edw. 1. c. 13.
 arrest in actions
 of account,
 and process of
 outlawry allow-
 ed thereon.

This privilege having been given to the merchants, the
 barons claimed still further power on their part, and in
 the same 13th year of Edward 1. c. 11., another act passed
 in favour of them, ordaining, " that when masters have
 " assigned auditors to take their *accounts*, and their ser-
 " vants, bailiffs, chamberlains, and receivers are found in
 " arrear, their bodies shall be arrested, and by the testimony
 " of the auditors, shall be sent or delivered to the next
 " gaol, to be kept by the sheriff in irons, at his own costs,
 " till he satisfies the arrears." The statute further gives
 the consequential process of exigent and outlawry thereon.
Vide the statute. This was a severe law, in comparison to
 that of Henry the Third, first passed against bailiffs.

25 Edw. 3.
 c. 17.

Arrest extended
 to debt and de-
 tinue.

Thus stood the law of arrests, till the 25th year of the
 reign of Edward 3. c. 17. when it was enacted, " that such
 " process shall be made in a writ of *debt* and *detinue* of chat-
 " tels, and *taking of beasts*, by writ of *capias*, &c. as is used in
 " a writ of account."

27 Edw. 3.
 Conusor of sta-
 tute staple.
 19 Hen. 7. c. 9.
 Arrest given in
 actions on the
 case;

The stat. of Edw. 1. therefore was then extended to ac-
 tions of debt, and detinue. The stat. of 27 Edw. 3. stat. 2.
 c. 9. enables the mayor of the staple to arrest the conusor
 of a statute staple. For a long period of time, namely, a
 century and an half, no further extension of the law of ar-
 rests took place, until at length, in the 19th year of the
 reign of Hen. 7. c. 9. The same process is given in *actions*
upon the case as in trespass or debt. And in the 23d year of
 Hen. 8. c. 14. the like process is ordained in actions for
 forcible entry on 5 Rich. 2. and also in actions of *annuity* and
covenant. And, lastly, by the 21 Jac. 1. c. 4. it is extended
 to popular actions, and the same process given in them as
 in trespass *vi & armis* at common law.

23 Hen. 8. c. 14.
 In forcible en-
 try, annuity,
 and covenant.
 21 Jac. 1. c. 4.
 In penal actions.

Thus,

Thus, by the interference of the legislature from time to time, is the process of the *capias*, and its concomitants the exigent and outlawry, now given in all civil cases: in the action of trespass, replevin, ejectment, deceit, conspiracy and fraud, by common law; and in *account*, debt, derinue, case, annuity, and covenant, by the above statutes.

One circumstance, perhaps, which expedited this extension of the *capias*, might be, that the legislature saw the courts were effecting, by indirect means, the imprisonment of the defendant, though not directly authorized so to do. And this was accomplished by the practice of declaring, as it is now termed, by the *bye*; that is, of charging the defendant, after he was once in court for one cause of action, with another fresh cause. Now, as at common law, the charge must have been a *trespass* to have authorized an arrest, process was sued out upon a charge of *trespass*, on which the party was taken into custody, and then this fictitious charge was suspended or abandoned, and a declaration delivered by the *bye*, charging him with a common debt or breach of promise; for it was held by the practice of the court, that when once the party was in the custody of the court, he was to be detained there till he had answered every charge which might be brought against him, pending the investigation of the original charge. Such was the mode adopted both in the King's Bench and Common Pleas, and the court of Exchequer also availed themselves of the same kind of fiction, by charging a person with being a *supposed* debtor of the king, getting him into their custody, and declaring in any common civil action.

But although the *capias* was by degrees extended to civil actions as above shewn, still it only issued in consequence of the party's disobedience to the process of the court; for it was necessary in both courts that the original bill or writ should be first filed or regularly issued, that the plaintiff should find real pledges to prosecute, lest his action should be malicious, and that a summons or warning to appear should be first given to the party by the sheriff on the writ of *pono* or attachment, and it was not till a disobedience thereto that the *capias* was to issue.

But even these preliminaries were by degrees omitted as unnecessary, the pledges to prosecute, as we have before seen, became mere matter of form, and at length, for the sake of expediting the proceedings, and preventing the defendant from eluding the process of the court, it became the practice to sue out the bill of Middlesex and *capias* in the first instance, without any original bill actually filed, or original writ sued out, or any summons or warning

How the arrest was encouraged by the courts by indirect means.

By declaring by the bye.

In all the courts.

Capias at first only issued after defendant had disobeyed the *pono* or attachment.

Capias afterwards issued in first instance.

Of the 13 Car. 2.

Introduction of
ac etiam

in both courts.

Operation
thereof.No use for ori-
ginal bill or
writ, except on
error after
judgment by
default.

given to the defendant. This practice prevailed in a great degree before the time of Charles the Second; but by the statute of the 13th of that king, whereby the real cause of action was obliged to be inserted in the process, it came into general use. For upon that the court of King's Bench, to preserve its jurisdiction over civil causes where the party was to be arrested for above 40 *l.* was obliged to resort to the expedient of inserting the *ac etiam* in their bill of Middlesex [as, before shewn, Sect. ii.] On which account Sir John Keelynge, then Ch. Just. of the King's Bench, had a long contest with Sir John Vaughan, then Ch. Just. of the Common Pleas, who died during the altercation; and Sir Francis North, who succeeded the latter judge, being unwilling to renew the dispute, suffered the court of King's Bench to continue quietly in the exercise of that practice, and made an order for the allowance of a similar clause of *ac etiam* in the writ of *capias quare clausum fregit*, the common process of that court, and that it should be so used in all bailable actions. The consequence of which was, that the *ac etiam* became a substitute for the original writ; nor did any original writ issue; which is the practice at this day in all personal actions where the plaintiff does not intend to proceed to outlawry, in which case the original writ must be sued out. So that the arrest was authorized by the bill of Middlesex, or *capias*, which supposed that the defendant had committed a trespass, or broken the plaintiff's close *vi et armis*; and the engrafting of the clause of the *ac etiam* was only to shew the true cause of action, and to point out to the sheriff to what amount above 40 *l.* he might insist upon bail.

Such is the brief history of the law of arrests, and of the seizure of a man's person, in the first instance, upon a bill of Middlesex, *latitat*, or *capias*, without any previous writ. The delay of suing out the original is thus avoided, and the expence of the fine payable thereon to the king saved [for which see Sect. ii.], whilst the whole proceedings are grounded upon the mere supposition that an original bill or writ have been previously filed, without which the court could have no jurisdiction in the action. The want therefore of such an original would have been fatal on a writ of error, but now it is cured by statute of Elizabeth *after verdict*, and is only cause of error after judgment by default; and even in this case, if error be brought upon application to the Master of the Rolls, an original may be made out *nunc pro tunc*, which will operate by relation so as to warrant the proceedings; and this, even in *penal* actions. [See Sect. ii.]

Thus

Thus have we endeavoured to shew the rise and progress of that power which the creditor exercised and still may exercise over the person of his debtor; it remains now to explain in what way the severity of the law has been in some degree mitigated in favour of the latter, by his discharge on bail, and the difference between common and special bail.

SECTION V.

Of Bail in Civil Actions; of the Difference between Common and Special Bail.

The arrest of the defendant, as appears from the preceding note, was warranted in all actions wherein the process of *capias* was allowed, and in all cases whatsoever of trespass *vi et armis*. The amount of the debt or demand, or the extent of the injury, was of no consequence; the sheriff was ordered by virtue of the process to seize the defendant, and to detain him in custody till the return of the writ. No bail was allowed, at least it was at the peril and risk of the sheriff to take bail. The liberty of the subject, so strenuously protected by the arm of the common law, seemed now exposed to the most imminent danger. The security which a defendant derived from the pledges to prosecute, formerly given by the plaintiff at the commencement of his suit, and who were answerable if he did not shew some foundation for his claim, no longer existed. No specific charge was alleged in the process; no debt sworn to; any one was liable to be suddenly seized by the iron hand of power, and dragged from his home to a dungeon, a victim to malice or revenge; a serious sufferer for the smallest and most trivial debt or offence. When arrested, he was subject to the insults, oppression, and extortion of the sheriff or his bailiffs; who, availing themselves of the undue advantages of their situation, actually let out to farm the emoluments of their offices. The courts indeed exercised a discretionary power, and in very trifling actions suffered the parties, when brought into court, to go at large, which was the origin of common bail, as will be presently shewn; but then it must have appeared upon the face of the process that the demand was for a trifling sum, and there was no restraint upon the plaintiff to prevent his stating the cause of action to be to any amount. Such was the hardship which attended the law of arrests; nor was any remedy attempted to be applied till the 23d of the reign of Henry 6., when an act passed, enacting, "that such offices (namely sheriffs and the like) should no longer be let to farm, and that persons arrested shall be

Arrest in trespass and on process of *capias*, without any respect to the amount of debt.

Hardships endured.

Extortion of the sheriffs.

Discretionary power in court to discharge on common bail but seldom exercised.

No remedy till the statute 23 Hen. 6. c. 9.

"discharged

“ discharged upon reasonable sureties of sufficient persons,
 “ having sufficient within the counties where such persons
 “ be so let to bail, to keep their days in such place as the
 “ writ shall require.” See an explanation of this stat. ch. 4.
 sec. 4. But this act was but of little avail, for still malice
 might be gratified, by prosecuting for a sum far beyond the
 ability of the defendant to get bail for: more especially in
 the King’s Bench, as, by the practice of that court, whoever
 became bail was answerable not merely for his forthcoming
 to answer that charge for which he was arrested, but to
 answer all other persons that should come in against him,
 and sue him by *bill* pending the first suit; and moreover, as
 the charge was for a trespass, and the damages to be recovered
 uncertain, the bail were not bound in any certain
 sum, but engaged that the defendant should pay to the plaintiff
 whatever he recovered, or render himself to the marshall,
 or that they would satisfy the damages. But in the Common
 Pleas the practice was otherwise, for there a certain debt or
 damage was expressed in the writ, and the bail only stipulated
 for him in the action, and in a sum certain. It is for
 this reason, and from this ancient practice, that the recognizances
 in the two courts at this day differ; in the Common Pleas
 being taken in a sum certain, in the King’s Bench
 not. Nor did the courts exercise their discretionary power
 so as to grant effectual relief; for their practice was, not to
 discharge the defendant on common bail in any case where
 the plaintiff stated his cause of action to amount to 10*l.* or
 upwards, though a little before they limited it to 20*l.*

The engine of oppression, which the law of arrests at that
 time was, in the hands of the wicked and powerful, manifestly
 appears, not only from the preamble of the above stat.
 of 23 H. 6. which reprobates the extortion and injustice
 complained of, but also from that of the statute of 8 Eliz. c. 2.
 whereby the legislature gave costs and damages to the defendant
 as a check to the abuse which prevailed of bringing malicious
 actions, and after the imprisonment of the party, not even
 declaring in them, and for which, before this statute, there was
 no redress to the party injured. The same statute also provides
 against another evil which existed, of suing out process and
 arresting a party in the name of a third person without his
 leave, and often when no such person existed.

It surely appears surprising that no steps were taken to ease
 the subject of a load, the weight of which was so manifestly
 oppressive. But from the time of Henry the 6th, till the 13th
 of Charles the 2d, nothing appears to have been done: an act
 then passed which has before been noticed in Sect. ii & iv,
 ordering *the particular cause of action to be*

which was but
 of little avail.

Extent of bail
 in K. B.

In C. B.

Reason of difference
 in their
 recognizances.

Courts did not
 bail, if action
 above 10*l.*

Grievances still
 existed,
 appears from
 preamble of
 23 Hen. 6. and
 8 Eliz. c. 2.;

and the evils
 there noticed.

Act of 13 Car. 2.

be expressed in the writ, in all cases where the sheriff was required to take bail for 40 l. or upwards, which was the origin of the *ac etiam* clause in the writs. But still nothing prevented the damages or debt being laid at any enormous sum the party chose; and the mere expressing the cause of action, as debt or the like, in the writ, so long as the amount of such debt was laid at the option of the plaintiff, could be but of little avail: besides which, even if the specific demand was accurately stated, it only applied to cases where bail was required for 40 l. The poorer class of people therefore were still the objects of oppression; and though no specific cause of action were mentioned, yet they were compelled to find bail for 40 l. or be thrown into prison. Nor was any relief bestowed till the late period of the 12th year of the reign of George the First, when an act passed (12 Geo. 1. c. 29.), by which it was enacted, "that no person shall be held to *special* bail upon any process where the cause of action shall not amount to 10 l.; but in such case the plaintiff shall only serve him with process, and if he does not appear, plaintiff may file common bail, or enter an appearance for him. And in all cases where the debt or cause of action amounts to 10 l. an affidavit must be made before a judge or proper commissioner, and the sum specified in such affidavit shall be indorsed on the back of such writ or process; for which sum so indorsed, the sheriff or officer shall take bail, and for no more. If no such affidavit and indorsement, the defendant is not to be arrested, let the amount of the debt be what it may." The court strictly require the affidavit to be positive. See ch. 4. sec. 1.

The above statute was made perpetual by the 21 Geo. 2. c. 3.; and by 19 Geo. 3. c. 70. no arrest is allowed on process out of inferior courts, if the cause of action be under 10 l.

It is observable, that nothing is said in the above statute of the *ac etiam* clause, or of specifying the true cause of action in the writ; so that the law in this respect stands as before, and no *ac etiam* need be inserted unless the defendant is to be held to bail for 40 l., as by the stat. 11 Car. 2. 1 H. Blac. 310.; though the common and indeed the best way is to insert it in all writs where defendant is to be held to bail.

Such were the slow but gradual steps by which justice seems to have advanced to the relief of defendants, who, at length, when arrested, became entitled to be discharged upon bail, and their adversary compelled to specify upon oath the nature of the charge, and exact amount for which the sheriff was to take security.

Defect thereof.

Most effectual remedy given by 12 Geo. 1. c. 29.

No arrest under 10 l.

Affidavit of debt required.

Sum sworn to, indorsed on writ.

Made perpetual, and extended to inferior courts.

Ac etiam only required as before.

Thus

How the ancient and modern practice of arrests differ.

Thus stands the law at this day; and the difference in this respect between the modern and ancient practice is most extraordinary. Originally no arrest was allowed for any debt, or purely civil cause of action, but only for trespasses committed *vi et armis*. Now the law is reversed, no arrest being allowed in actions of trespass *vi et armis*, (except by a particular order of a judge,) but only in cases of debt and other civil actions.

Different kinds of bail; to the sheriff, and to the action. Bail to the sheriff.

It is observable that there are two kinds of bail: bail to the sheriff, or bail below; and bail to the action, or bail above. The first is given to the sheriff immediately upon the arrest, according to the stat. Hen. 6. the sureties enter into a bail-bond, with a condition that the defendant shall appear in the court, and at the time specified in the writ. Formerly, if the condition of the bond was broken, the plaintiff could only proceed against the sheriff, by ruling him to return the writ; but he had no remedy against the sureties on the bail-bond, unless the sheriff delivered it up to him, and gave him leave to sue in his name, which was purely optional. But as an additional remedy (by the 4 & 5 Ann. c. 16. s. 20.), the sheriff, at the request and cost of the plaintiff, must now assign to him such bail-bond, by a proper indorsement thereon, and plaintiff may bring an action against the sureties in his own name; so that now he has a double remedy, either against the sheriff, which he may still pursue, or against the bail, as assignee of the bail-bond.

Of the assignment of bail-bond.

Bail to the action.

When the defendant has appeared according to the condition of the bond, bail *above*, or to the action, are then put in, who enter into a recognizance to be answerable for the damages, which may be ultimately awarded if the defendant does not pay them, or render himself to prison: these recognizances differ in the two courts, as before observed.

Origin of common bail, and difference between that and special bail.

Before I leave this subject of bail, it may be useful to add a few words on the origin of common bail, and the difference between that and special bail. The latter, we find, is when real responsible sureties are actually given; the former is merely nominal bail, John Doe and Richard Roe, of no possible use, by way of pledges or security. Yet it seems that the distinction between common and special bail took place very early, for Sir Edward Coke cites an entry of bail in the twenty-seventh year of King Henry the Third, *coram rege*, in these words, "*H. P. captus per querimoniam mercatorum Flandrie, et imprisonatus offert domino regi Hus & HAUT in plegio ad standum recto, & ad respondendum praedictis mercatoribus, et omnibus aliis qui versus eum loqui voluerint,*"

Common bail of great antiquity.

"*erint*," &c. "Of these words (says Sir Edward, 4 Inst. 72.), *has* and *haut*, (two French words,) *has* signifying an elder-tree, and *haut*, the staff of an halbert, &c. I leave the conjecture that some have made thereof to themselves: we think it was then common bail, now changed to *Do* and *Ro*; and the rather, for this word *offert*: and it is observable, that by putting in bail at one man's suit, he was in *custodiâ mareschalli* to answer all others which would sue him by bill, and this continueth to this day."

This conclusion of that eminent lawyer appears fairly drawn; and the student may, from such an authority, with confidence infer, that the practice of putting in common bail is of ancient origin. We have before shewn, that the court exercised a discretionary power in holding defendants to special bail or not, according to the amount of the demand. At first, as appears by a rule of court in the Complete Attorney, printed in 1676, fol. 45. they limited it to 20*l.*, afterwards to 10*l.*; and although in causes under 10*l.* actual bail was not required, yet the defendant was brought up by the sheriff on the return of the writ, and in order that he might be in court, and supposed to be in their custody ready to receive any other charge that might be exhibited against him, common bail was filed of record in the names of John Doe and Richard-Roe. And it is now necessary that this common bail should be filed in all actions not bailable, before the plaintiff can proceed, for till then the defendant is not in court; but by the last statute of 12 Geo. 1. c. 29. after the defendant has been served with process, the plaintiff, if he does not appear within the time allowed, may file common bail, or enter an appearance for him.

Reason thereof.

In the Common Pleas the same distinction is made between common and special bail; but it is there called *entering an appearance*; and the form, instead of being as in the King's Bench, that *A. B. having been served with process, is delivered to bail, (that is to say,) to John Doe and Richard Roe, at the suit of C. D.*, it runs thus, *B.'s appearance for A. B. late of W. in the said county, yeoman, at the suit of A. B.* The reason of this seems to be, that in the King's Bench, as their original jurisdiction was only in matters of trespasss, and the bill was therefore sometimes called the bill in trespasss; and as in all cases of trespasss the party was liable to be arrested, the defendant was of course in every action brought into court, and delivered into the custody of the marshal.

How in C. B. called entering an appearance.

Reason thereof.

There was no process to compel an *appearance*, as by distringas, or the like; but as the bill now called the bill of *Middlesex*, or the *latitat*, was only supposed to issue in cases of trespasss, the defendant's person was liable to be seized: when

when in court, he was supposed to be in custody of the marshal; it was upon this supposition that other actions, not of trespass, were afterwards brought against him. And to preserve this jurisdiction, it was necessary that he should either be in the actual custody of the court, or let out by the court upon bail; which, when civil actions became bailable, was done by giving *special* bail, as it is called; or, if in the discretion of the court they thought it too trivial a case to require real sureties, the defendant was suffered to remain at liberty, by putting in nominal persons, called filing *common bail*, still keeping up the *supposition* that he was in the custody of the court, but only out upon bail. Whereas in the Common Pleas no such supposition of the defendant being in the custody of the court prevailed; and the intention of the process was originally very different, the operation of the attachment, or summons and distringas, being nothing more than to compel the *appearance* of the party; if he voluntarily appeared, the process ceased: and indeed, upon the first introduction of the *capias*, it was only as a punishment for the refractory disobedience of the defendant in not appearing to the former process. This appearance was entered in the proceedings of the court. There was a day called the *appearance* day, being the *quarto die post* after the return of the process. The use of the appearance was to shew that the defendant was in court to answer the charge against him: it had no other end to effect. After the introduction therefore of the *capias*, and the practice of taking bail, if the judges of the court, who exercised their discretion, thought the action not of sufficient importance to require special bail, they permitted the party to remain at liberty, and only requested him voluntarily to enter his *appearance*, so as to shew himself ready to answer the charge; and we find by the stat. of 12 Geo. 1. c. 29. that if this is not now done by the defendant after service of process in actions not bailable, the plaintiff may enter an appearance for him. This seems to account for the difference of the practice in the two courts, in actions not bailable, by *common bail* being filed in one, and an *appearance* entered in the other.

12 Geo. 1. does not take away process by original, quare clausum fregit, or summons. Bar. 407.

It may be proper to add one more observation upon the subject; namely, that the statute 12 Geo. 1. does not take away the ancient method of proceeding in the court of Common Pleas by original and distringas: it only prescribes a new mode by way of process against the *person*; but plaintiff may still proceed against the goods of the defendant by *pone* and distress, or *summons* and distress, as the case may be. If in trespass, or on the case, or such like actions arising *ex delicto*, the ancient process is by *pone*, or attachment

ment and distringas; if in debt, covenant, or actions arising *ex contractu*, it is by *summons* and distringas; which is the reason why in the declaration in the Common Pleas, in the former actions, it is stated defendant was ATTACHED, and in the latter that he was *summoned* to answer plaintiff.

Reason why in declaration in C. B. defendant is sometimes attached, and sometimes summoned.

SECTION VI.

Of the ancient Mode of pleading Ore Tenus; of the Affizes and Trials at Nisi Prius; and the Difference in making up the Records in the two Courts.

Formerly, when the defendant was arrested, and brought into court upon the process that had issued against him, it was the duty of the plaintiff to deliver in his charge, to which the defendant answered, and the plaintiff replied *viva voce* in person in open court. The pleadings were then carried on by word of mouth; and the parties obliged personally to attend. But the statute of *Westminster 2.* which passed in the 13th year of the reign of Edw. 1. authorised the appointment of *attornies*, who had full power in all pleas moved during the circuit until the same were determined, or such attorney was removed. After that time, the personal attendance of the parties being dispensed with, they carried on the pleadings in the suit by their attornies; still however there were parol pleadings delivered *viva voce*; and it is said in a former part of this Introduction, Sec. ii. (upon the authority of Mr. Crompton, to whom I am indebted for the greatest part of this Introduction,) that these *viva voce* proceedings continued until after the reformation; but I greatly doubt that, and am inclined to think that they were reduced to writing in a much earlier period. It is said by some, so early as in the reign of Edward the Third, and there is certainly good reason to conclude, from the alteration in the pleadings about that time, that they were not hastily spoken, but rather deliberately penned. It is clear however, that the practice of delivering pleadings *ore tenus* continued longer in the Common Pleas than in the King's Bench. When this mode of pleading was discontinued in the King's Bench, the practice was, that if the defendant appeared personally at the return of the writ, the plaintiff was to declare within three days. If he appeared by attorney, he was to declare within the term. For this reason there was never any continuance from the appearance-day to the time of declaring, nor any precedent of *libertas narrandi*; and so is the practice of declaring within the term wherein the

Proceedings originally ore tenus and in person.

When attornies allowed.

When *viva voce* proceedings discontinued.

Gilbert's Origin of King's Bench. Reeve's History of English Law.

Gilb. Hist. C. B. 44.

Lasted longer in C. B.

8 Eliz. c. 2.

Gilb. Hist. C. B. 41.

Meaning of *dies
datus proce-
partium*.

Of the impar-
lance roll.

Gilbert's Origin
K. B. 314.

Plea roll.

Nisi prius, or
issue roll.

Cause of intro-
duction of paper
pleadings.

How issue made
up.

In K. B.

In C. B.

the writ is returnable even at this day. But the parties might at that time have obtained *by consent* a day before declaration for the plaintiff to declare in, which was called *dies datus proce partium*. But in that case, if the defendant did not appear at the day given, since there was no declaration, the plaintiff could not have judgment, but was obliged to bring the defendant in again by process, that he might declare against him; for none could have judgment except *upon complaint exhibited to the court against defendant vobis in court*. When the plaintiff declared, the defendant in the King's Bench generally had of course an imparlance for time to plead till the next term, and the bill or declaration was entered on a roll. This practice in the King's Bench created a similar one in the Common Pleas; for when the plaintiff declared, though it was *ore tenus*, it was minuted by the prothonotary, and likewise the prayer or permission to imparl; then in conformity to the King's Bench, they entered a declaration on a roll which was called the imparlance roll; this was done the first term. They then entered the next term the further proceedings to issue which formed the plea roll; from which the *nisi prius* or issue roll was made up; upon the back of which the verdict was entered, which was afterwards transcribed upon the plea roll, and thereon judgment was entered. But, in time, these proceedings were changed, the pleadings were delivered in paper to each party; and if special, made out by the clerk of the papers in King's Bench; from them the *nisi prius* roll was made up, and the judgment entered thereon. The reason why paper proceedings were introduced instead of the rolls of the court, was on account of the increase of business in the courts; and that it was not possible for the prothonotaries to enter the pleadings upon the roll, and therefore the attornies were permitted to deliver their pleadings in paper one to another. Hence it is, that these paper proceedings are looked upon as the original materials to settle the *nisi prius* roll. In the Common Pleas the issues are now made up by the attornies themselves; in the King's Bench, if any special pleadings, they are prepared by the clerk of the papers, and called the paper books; and if no special pleadings, they are, as in the Common Pleas, called issues, and made up by the attornies. Possibly the difference in the two courts in their practice in this respect might arise from the cause above hinted at, viz. the multiplicity of suits which came into the Common Pleas, and which rendered it impossible for the prothonotaries to transcribe and make out the pleadings; for that court certainly on its first establishment, and for a length of time afterwards, had infinitely a greater quantity of business than the King's Bench.

Before

Before the time of the Conqueror, law proceedings were in Latin. In his time they were ordered to be in French; which being a language introduced by the Normans, and little known in this country, created great confusion, as appears in the preamble of the statute 36 Edw. 3. sec. 1. c. 15. which enacts, that the pleadings shall be in *English*, but entered and inrolled in *Latin*, which was reviving the ancient usage; and this practice continued till the 4 Geo. 2. c. 26. when they were directed to be recorded and engrossed in the *English* language. From this time the use of court-hand in all law proceedings was also discontinued.

Law proceedings in Latin.

In French.

In English, but records in Latin.

The whole now in English.

Of the Assizes and Trials at Nisi Prius.

From the multiplicity of business which flowed into the courts of *Aula Regis* and *Exchequer*, the grand justiciary and his assessors on the Bench soon found themselves fully occupied; and as the application to these courts became more frequent, it was judged necessary, both in aid of themselves, and in relief of suitors, to erect some other tribunal of the same nature. Accordingly, justices were appointed to go *itiner* or circuits through the kingdom, and determine pleas in the several counties. To these new tribunals was given a very comprehensive jurisdiction. As they were a sort of emanations from the *Curia Regis* and *Exchequer*, and were substituted in some measure in their place, (except with the reservation of appeal thereto,) they were endowed with all the authorities and powers of those courts. These justices *itinerant* or *errant*, in their several *itiner* or *eyres*, held plea of all causes whether civil or criminal, and in most respects discharged the office of both the superior courts. The characters of the persons entrusted with this jurisdiction were equal to the high authority they exercised; the same persons who were justices in the king's court being (amongst others) justices *itinerant*. They acted under the king's writ in nature of a *commission*, and they went generally from seven years to seven years, though their circuits sometimes returned at shorter intervals. Their circuits became a kind of limitation in criminal prosecutions, as no one could be indicted for any thing done before the preceding *eyre*.

Institution of justices in eyre.

Reeve's Hist. Law, 52.

Their power.

Whence derived.

Circuits when held.

At what time justices in eyre first established.

It is not easy to determine the exact period when this establishment of justices *itinerant* was first made. It has long been the common opinion that they were first appointed in the great council held at Nottingham, or, as some say, at Northampton, in the 22d year of Henry the Second, *anno Domini* 1176, when the king, by the advice of the great council,

Kingdom di-
vided into six
circuits.

Then into four.

Afterwards into
six.

Delay in cri-
minal cases,
from circuits
being held sel-
dom.

Reeve, 57.

Origin of com-
mission of gaol
delivery.

Of the trial by
duel or battle.

Nature thereof.

Oath necessary.

Form thereof.

Reeve, 82.

cily divided the realm into six circuits, and sent out three jus-
tices in each to administer justice.

The counties assigned to each of these circuits were as
follow: to one, the counties of Norfolk, Suffolk, Cambridge,
Huntingdon, Bedford, Buckingham, Essex, Hertford; to an-
other, Lincoln, Nottingham, Derby, Stafford, Warwick, North-
ampton, Leicester; to another, Kent, Surrey, Southampton,
Sussex, Berks, Oxford; to another, Wilts, Dorset, Somerset,
Devon, Cornwall; to another, York, Richmond, Lancaster,
Copland, Westmoreland, Northumberland, Cumberland.

About three years afterwards the kingdom was parcelled
out into four circuits only, the county of Middlesex, which
before was not noticed, was then included, and more justices
assigned to each. But they were since again divided into six
circuits as they are at this day. The criminal jurisprudence
of the country being found very defective, from the great
delay of justice in criminal cases, as all trials of that kind
were obliged to be deferred till the justices *itinerant* came
into the county, commissions used to be occasionally issued,
empowering certain justices therein named to make a *delivery*
of the gaol specified in the commission, that is to examine into
the offences of all the prisoners therein, and to discharge,
continue in custody, or punish them according to their sever-
al crimes. The exact time when this practice commenced
is not ascertained. It had been a very ancient custom among
the Normans, both in their own country and in France, to
try titles to land, and other questions, by *duel*. When Wil-
liam had ordained that this martial practice of his own
country should be observed here in *criminal* trials, it became
very easy to introduce it in *civil* cases; and, being only used
in the *Curia Regis*, it had not, among the other novelties of
that court, as it certainly would have had in the county-
court, or any other of the ancient tribunals of Saxon ori-
ginal, the appearance of so singular an innovation. With
all its absurdity, this mode of trial was not without some
marks of a rational reliance on testimony and vouchers for
the truth of what was in dispute; for it was never awarded
without the oath of a credible witness, who would venture
his life in the duel for the truth of what he swore. "I am
" ready," says the party litigant, " to prove it by my free-
" man John, whom his father on his death-bed had enjoin-
" ed, by the duty he owed him, that if at any time he should
" hear of a suit for this land, he should hazard himself in a
" *duel* for it, as for that which his father had *seen and heard*."
Thus the champion of the demandant was such as might be
a fit witness, and on that account the demandant could never
engage

engage in the combat himself; but the other party, who was defendant or tenant in the suit, might engage either in his own person or by that of another.

It is difficult to say what matters were at one time submitted to this mode of trial. Perhaps, at first, all questions of fact might, at the option of the demandant, have been tried by battle. In the reign of Henry the Second it was decisive in pleas concerning freehold, in writs of right, in warranty of land, or of goods sold, debts upon mortgage or promise, sureties denying their suretyship, the validity of charters, and questions concerning services. But notwithstanding the general bent of this people to admit the propriety of a trial so suitable to their martial genius, there must have been men of gravity and learning among them at all times, and persons of that character would always reprobate so ineffectual and cruel a proceeding.

As men became more civilized, a change was effected; and we find in the reign of Henry the Second, that many questions of fact relating to property were tried by twelve *liberos et legales homines juratos* sworn to speak the truth, who were summoned by the sheriff for that purpose. This tribunal was in some cases called *assisa*, from *assidere*, as it is said, because they sat together: though it is most probable, and indeed seems intimated by the manner in which Glanville often expresses himself, that it was emphatically so called from the *assisa*, as the laws were then termed, by which the application of this trial was in many instances ordained. On other occasions this trial was called *jurata*, from the *juratos* or *juratores* who composed it.

Although instances might have occurred before of trial something similar to that of trial by jury, yet it was not till the reign of Henry the Second that the present trial by jury became general. This law called *assisa* ordained that all questions of *seisin* of land should be tried by a recognition of twelve good and lawful men, sworn to speak the truth; and that in questions of *right* of land, the tenant might elect to have the matter tried by twelve good and lawful knights, instead of the duel. It appears that some incidental points in a cause, that were neither questions of mere *right* nor of *seisin* of land, were tried by a recognition of twelve men; and that in all these cases, the proceeding was called *per assisam* and *per recognitionem*; and the persons composing it were called *juratores*, *jurati*, *recognitores assise*, and collectively *assisa et recognitio*; only the twelve jurors in questions of mere *right*, being knights, were distinguished with the appellation of *magna assisa*, which is the case at this day in trials on a writ of right. Thus far have we shewn the nature of this

Who might be parties.

In what cases, and

in all matters relating to landed disputes.

How changed into trial by jury.

Reeve, 83

Which was sometimes called *assisa*.

What *assisa* properly means.

Operation thereof.

Recognition what.

Magna *assisa*, what.

Juries used in
other actions,
what then
called.

species of trial by jury called *assise*, and to what causes it related. Juries were also used in other cases not called *assise*, as in questions of property not relating to land, in which actions the proceedings were said to be *per juratam patrie*, or *vicineti*, *per inquisitionem*, *per juramentum legalium hominum*; and this in criminal as well as civil matters.

The above observations were thought necessary, in order that the student might understand the true meaning of the word *assize*, and the nature of the commission of assize, and the office of judge of assize.

Establishment
of judges of
assize.

In the reign of Henry the Third, in order to render the proceeding by assize more expeditious, and not to delay the inquiry until the coming of the justices in eyre, who we find seldom went their circuits, other justices were appointed to go circuits once every year to take assizes; they acted in this respect under the king's commission, called the Commission of Assize, and the justices were denominated Judges of Assize. To these justices were *associated* the knights of the county, who with them took the assize; and this is probably the origin of the present *association* in the commission of assize.

Origin of asso-
ciates with
them.

Of the commis-
sion of oyer and
terminer.

In ancient times, when any particular outrage or misdemeanor had been committed, a certain writ used to issue *ad audiendum ad terminandum* such offence, since called the Commission of Oyer and Terminer, which was directed to any justice, or even private person, at the suit of the party requiring, or the discretion of the officer granting it; but in the reign of Edward the First it was ordained by statute, that this writ should not be granted before any justices except justices of either bench, and justices in eyre, unless in cases of particular enormity, where the king *ex necessitate rei* should think fit to grant it.

Of trials at nisi
prius, 13 Ed. 1.
c. 30.

I mention this, because now the justices of assize act under the commission of oyer and terminer.

Clause of nisi
prius of earlier
origin.

In this same reign of Edward the First passed the statute of *nisi prius*, as it is called. Indeed, before this time, the *nisi prius* clause was not altogether unknown; for as great expence was occasioned to the parties in bringing up witnesses and the like, from distant parts to Westminster, on the trial of trifling causes, a practice very early obtained, of *continuing* the cause from term to term in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose; and if they did, they had jurisdiction of the cause. *Semper dabitur dies* (says Bracton, lib. 3. tr. 1. c. 11. f. 8.) *partibus a justiciariis de banco sub tali conditione "nisi justiciarii itinerantes prius venerint ad partes illas."*

But by the statute of *nisi prius* in the reign of Edward the First justices of assize were empowered to try common issues in trespass and other less important suits, with directions to return them (when tried) into the court above, where alone the judgment should be given. And as only the trial and not the determination of the cause was now intended to be had in the court below, therefore the clause of *nisi prius* was left out of the *conditional continuances* before mentioned, and was directed by the statute to be inserted in the writs of *venire facias* (a); that is, "That the sheriff should cause the jurors to come to *Westminster* (or wheresoever the king's court should be held) on such a day in Easter and Michaelmas terms: *Nisi prius*, that is to say, *unless before* that day the justices assigned to take assizes shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assize, which was sure to be held in the vacation before Easter and Michaelmas terms, and there the trial was had.

But an inconvenience attended this provision; principally because as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by the stat. 42 Edw. 3. c. 11. the method of trials by *nisi prius* was altered; and it was enacted, that no inquests (except of assize and gaol delivery) should be taken by a writ of *nisi prius* till after the sheriff had returned the names of the jurors to the court above. So that now, in almost every civil cause, the clause of *nisi prius* is left out of the writ of *venire facias*, which is the sheriff's warrant to return the jury, and is inserted in another part of the proceedings.

The present practice is to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, viz. Hilary or Trinity terms, which, from the making up of the issues therein to be tried at the assizes, are called *issuable* terms; and he returns the names of the jurors in a *panel* (a little pane or oblong piece of parchment) annexed to the writ. This jury is not summoned, and therefore not appearing at the day, must unavoidably make default; for which reason a compulsive process is now awarded against the jurors, called in the Common Pleas a writ of *habeas corpora juratorum*, and in the King's Bench a *distringas*, commanding the sheriff to *have their bodies*, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. The entry, therefore, on the roll or record after the

but now inserted in different parts of the process to always occur

Of the venire.

Nature of nisi prius; clause therein.

Inconvenience of nisi prius being in venire.

How altered,

and now inserted in *distringas* or *habeas corpora juratorum*.

Panel of jurors, what.

(a) For further information on this subject, see Gilb. Hist. C. B. 77.

Present form of
entry of nisi
prius clause or
roll.

Operation
thereof.

3 Blac. Com.
354.

Of the different
commissions
judges on cir-
cuits act under.

Of the associate.

The non omnes
clause.

3 Blac. Com.
59.

Construction of
stat. Edw. 1. of
oyer and ter-
miner.
1 Woodeson,
113.

venue is, "that the jury is respited through defect of the jurors till the first day of the next term, then to appear at Westminster, unless before that time (*nisi prius*) viz. on Saturday the 23d of February, the justices of our lord the king appointed to take assizes in that county shall have come to Buckingham (that is to the place assigned for holding the assizes)." And thereupon the writ commands the sheriff to have their bodies at Westminster, or before the said justices of assize, if before that time they come to Buckingham, viz. on the 23d February aforesaid. And as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff summons the jury to appear at the assizes, and there the trial is had before the justices of assize and *nisi prius*, among whom are usually two of the judges of the courts of Westminster, the whole kingdom being divided into six circuits for this purpose. Thus we may observe that the trial of common issues at *nisi prius*, which was in its original only a collateral incident to the original business of the justices of assize, is now by the various revolutions of practice become their principal civil employment: hardly any thing remaining in use of the real assizes but the name.

The judges upon their circuits now sit by virtue of five several commissions, the origin and nature of which we have above shewn, and how they were respectively acted upon.

1. The commission of the peace, as conservators of the peace generally. 2. A commission of oyer and terminer. 3. A commission of general gaol delivery. 4. A commission of assize. 5. That of *nisi prius*. These commissions are constantly accompanied by writs of association, in pursuance of the statute of Edw. 1. & 2., whereby certain persons (usually the clerk of assize and his subordinate officer, called from thence the judge's associate) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes, &c. that a sufficient supply of commissioners may never be wanting.

But to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *fi non omnes*, directing that if all cannot be present any two of them (a justice or serjeant being one) may proceed to execute the commission.

The ancient statutes before mentioned, which forbid the issuing of oyers and terminers, except to the justices of one bench or the other, or to those in eyre, are restrained by Serjeant Hawkins's judicious interpretation to mean special commissions only, granted at the complaint of particular persons, which practice hath long been obsolete.

The

The courts holden before our present itinerant justices, exercising either their civil or criminal jurisdiction, are of record. The records are made up in the superior courts at *Westminster*, and then go down to be tried in their proper county before these justices; after which they are returned back to the higher jurisdiction with the verdict of the jury, for the purpose of entering up judgment, and carrying that judgment into execution.

Of the Difference in making up the Records in the two Courts.

The student will find in the course of the work (particularly Ch. ix.) a material difference in the mode of making up the records of the two courts; to explain which it will be necessary to consider in what manner, after issue is joined, and the *venire* and *distringas* made returnable, the continuances are entered in the two courts.

If it be an issuable term, the *venire* is made returnable the last day of the term, without any *nisi prius* in it, as it anciently was [see *ante* this Section]; and from that day the *distringas* is tested with a *nisi prius*, returnable with a day in bank; if issue be joined, and they do not go to trial the same term, then they award a *venire* on the roll, returnable the same or the next term; and if they do not go to trial, they continue the process by a *vice comes non misit breve*; and then there is on the roll a new *venire* awarded till the vacation, when they go to trial; and when they are going to trial, they take the roll and enter the continuances to the *distringas*, which award of the *distringas* is never entered on the plea roll, but only at the first day of next term after the assizes when the *poslea* is returned, they enter it *poslea continuato inde processu*, which is a recital of the continuance warranted by the *nisi prius* roll. The reason of this practice is this, that if they had entered the award of the *distringas* on the plea roll, and had not gone to trial, they must from thence award an *alias* and *pluries distringas*, which would have obliged the jury to come in term, and in a term not issuable. By this practice, they saved all trouble and expence of that nature, and yet they continued the acts of the court as well; for *poslea continuato inde processu* shews on the plea roll, that the last award of the *venire* in the former term was continued to the day in bank by the process, viz. by the *distringas*; and the award of the *distringas* was not necessary to be entered, since it was an act relating to a trial out of the court, and not in the court itself; and therefore, preparatory to the trial, was formerly entered on the *nisi prius* or issue roll, so called, because on it

Courts of nisi prius.

Courts of record. Judgment given in courts above.

How *venire* awarded.

Distringas.

How entered on the roll.

What kind of continuances.

Of the *poslea continuato inde*, &c.

Use of that entry.

How continuances formerly entered on plea roll.

Now generally
on nisi prius
roll.

Reason why no
placita in C. B.

but one in K. B.

Of the ancient
continuance
roll.

Use thereof.

When abolish-
ed.

Why.

the pleadings were entered to the issue at that time; and as it was unnecessary to enter the continuance on the plea roll, so it was not expedient, because such continuance would have embarrassed the parties and jury; and therefore a general entry was thought sufficient on the *nisi prius* roll: the declaration and pleadings are now entered to the issue joined, together with the first award to the *venire*. But to save the trouble of such entry of continuances, they enter the *placita* of the term in the vacation, when they go to trial, at the bottom of the *nisi prius* roll, between the award of the *venire* and the *jurat*; and this shews the judge of assize, that it was an issue continued to the last term, and is a warrant to the officer above to continue the *venire* until the time of issuing the *distringas*. Hence in the Common Pleas they make no *placita* at the bottom when they go to trial the *same term issue is joined*; for that would apparently be unnecessary since such *placita* came instead of the continuances; but in the King's Bench, they always entered the *placita*, though they went to trial the same term; for anciently the continuances in that court were from one day to another day in the same term. Besides which, it is to be noted, that in the Common Pleas, there was anciently a *continuance roll* for the jury process; so that after the *venire* was awarded, and the jury process was continued from term to term, they entered the continuance on a roll of that day to which such process was continued, entering up the style of the court on the top of such roll, numbering the roll; and so, when continued to a subsequent term, they entered on the continuance roll of that day in the same manner; and when the *postea* came up, then their entry was made in this manner: *postea continuato processu pred. inter partes pred. per jur. ponit inde inter eos in respectum huc usq. ad tunc diem scil. in Octab. Sancti Trinitat. nisi Jusficiar. prius, &c.*

And when such records were sent for by writ of error at the end of the judgment, they sent the *placita* of the particular times of continuances to warrant that part of the roll that mentions the *continuato inde processu*; and this is evident from Rastall's Entries, title Error, in a roll in the 5 Edw. 4. where the very number of each roll of continuance is entered at the foot of the judgment. After 32 Hen. 8. c. 30. the continuance roll was dropt; because, by that statute, all discontinuances were cured after verdict; and therefore they only entered on the plea roll the award of the *venire*, which they continued as before mentioned, by a *vic. non nisi breve*; but now that is dropt, and they only enter *postea continuato inde processu inter partes pred.* entering the verdict returned on the *postea*; and they need not, on the foot of the record,

enter

enter any continuance, since the want of a continuance is cured after verdict; but they enter the *placita* and the award of the *disfringas* on the *nisi prius* roll, to be an authority to the judge to try the cause.

The day at *nisi prius*, and in bank, are, in consideration of the law, the same; because the writ of *nisi prius*, which gives authority to the judge to try the cause in the country, is instead of the court; and therefore the *postea*, certified by him on the day of bank, is the same as if the jury had come up to the court; and this, as was said, is for the ease of the subject, that the jury and witnesses may not be brought out of their proper county.

If a *venire* is awarded, and they do not go to trial the next assizes, but it lies for several terms, the continuance may be made by a *vic. non misit breve*; but if a *nisi prius* be awarded, and some of the jury appear, and the panel be not full, so that the trial is not carried on, they only enter those of the jury that appeared, *et alii non venerunt, ideo respectuatur to the next term pro defecto jur.*; and at the day in the next term, they award an *alias disfringas* to the next assizes, with a *nisi prius* until the next term.

Use and operation of the *postea*.

How continuances now to be made.

SECTION VII.

Of the several Ways in which Actions may now be brought in the Courts of King's Bench and Common Pleas.

As a conclusion to this Introduction, and by way of assisting the Student in the better understanding of the following Work, I shall briefly shew the various modes of bringing Actions in the two Courts, recapitulating in part what has been before advanced in the two or three first Sections.

An action is defined differently by different writers: It is said, by Bracton and Fleta, to be *Nibil aliud quam jus prosequendi in judicio quod sibi debetur*. By Lord C. J. Coke (Co. Litt. 285.) it is called, "A legal demand of one's right." By another learned author (3 Black. Com. 116, 117.) it is considered as a "remedial instrument of justice, whereby redress is obtained for any wrong committed, or right withheld." But, more immediately to answer our present purpose, it may not, perhaps, be improperly defined, "The method prescribed by different statutes, and by the rules and practice of the respective courts, for the recovery of any debt due, or of an equivalent in damages for any injury sustained."

An action, what.

The

How to be brought.

The first question which naturally suggests itself, is, What is the *method* for *proceeding*? In what way is this legal mode of redress, called an *action*; to be enforced? Which leads to the consideration of the several ways of bringing actions in the respective courts.

(A)
In B. R.

(A) Of the several Ways of bringing an Action in the Court of King's Bench.

(A. 1)

(A. 1) In all common Cases.

1. By Bill.

2. By Special Original.

What meant by common cases.

By *common cases*, is to be here understood, all such actions as are brought by one common person against another, where the defendant is not a prisoner in the *actual* custody of the court.

It is well known, that the present usual method in such cases, of commencing a suit in the court of King's Bench is either by *bill of Middlesex* or *latitat*.

But the bill of Middlesex and latitat, strictly speaking, are nothing more than *process* to bring the party into court, founded upon a certain *plaint*, called a *bill*, supposed to have been previously filed by the plaintiff. For which reason this mode of proceeding is termed, BY BILL.

Of proceedings by bill.

As this *bill*, which, for distinction's sake, we will call the *original bill*, is not, in point of fact, now filed, but the process of the bill of Middlesex is sued out, in the first instance; the *former* is too often confounded with the *latter*; or sometimes it is as erroneously mistaken for the same kind of *bill* with that filed in proceedings against attornies and prisoners.

Mistaken for other bills.

An explanation thereof.

To prevent, therefore, any such misconceptions, and to assist the reader in the better understanding of the practice of this court, we will endeavour, in as few words as the nature of the subject will admit, to explain this *general mode of proceeding BY BILL in common cases*.

The court of King's Bench had always, from its first establishment, an *original jurisdiction* over *criminal offences*, or *pleas of the crown*; and also over such *civil matters* as were in breach of the peace, and therefore denominated *trespass*. [Sec. i & ii.]

[Section i & ii.]

It also necessarily possessed a mode of proceeding peculiar to itself, as incidental to such original jurisdiction: which mode of proceeding was by *bill*. And as this jurisdiction at first extended only to such civil matters as were deemed *trespasses*, it was necessary that this *bill* should allege, generally,

rally, a *trespass* to have been committed by defendant. It has, therefore, sometimes been called, and not improperly, the bill in *trespass*. (Tidd's Pract. 85.)

By specious contrivances, and subtle legal fictions [Section ii.], this jurisdiction over civil matters was gradually extended, and the court of King's Bench now takes cognizance of all (a) *personal* actions, equally with the court of Common Pleas.

But this cognizance is still founded upon the legal supposition, that a *trespass* has been committed. [Section i.]

The same mode of proceeding, therefore, by *bill*, prevails, and is the general way of bringing actions, as well in *trespass*, as in all common cases.

But although the *species* of action by *bill*, at this day used in all civil matters, is the same as was originally confined to cases of force or *trespass* only; yet the modern practice of commencing suits (by *bill* of *Middlesex* and *saletat*) is very different from the ancient.

Formerly the practice was, actually to file, in the first instance, a certain *plaint* in writing, with the proper officer of this court, charging defendant, generally, with the commission of some *trespass* [Section ii.]; and this *plaint* was called the *bill*, and is the same as we have before called the *original bill*, or the bill in *trespass*. Upon this *bill* being filed, there issued the *process* to bring the defendant into court, to answer to this plea of *trespass*, which was afterwards more at large set forth, when defendant appeared in court, in plaintiff's declaration.

This *process*, according to some writers, was an *attachment*; and if the sheriff returned, that defendant had nothing by which he could be attached, there then issued a precept in the nature of a *capias*.—According to other authors, the precept was the *first process* that issued to compel an appearance. But whatever the *ancient* mode might have been, it gradually became the practice to sue out the *precept* in the first instance. [Section ii.]

This precept was also called a *bill*; but, by way of distinction, was further denominated, a bill of the particular county in which the court sat; for which reason it is now called a *bill of Middlesex*. If the defendant were not to be found in that county, the sheriff returned the precept accordingly, *non est inventus*; and thereupon a writ issued to the sheriff of such county wherein it was thought defendant would be found; reciting, that the former precept had issued,

(a) So also of *mixed* actions, as *ejectment*, &c. but the court of C. B. still exercises exclusive jurisdiction over *real* actions, as writ of right, &c.

and

Called the bill in trespass.

The ancient and present mode of proceeding by bill the same.

But the practice in commencing suits different.

The ancient practice.

The bill of Middlesex.

Why so called.

The *testatum* bill, or *latitat*, why so called.

and had been returned, and that (*testatum est*), i. e. it was *testified*, that the defendant (*latitat*) lie hid and lurked in the county, to the sheriff of which this last writ was directed; and from these two words in the writ, which was formerly in Latin (a), it was sometimes called a *testatum* bill of Middlesex; but more commonly a *latitat*.

Alteration in ancient practice.

As the chief use of this plaint, or bill in trespass, was to bring the defendant within the jurisdiction of this court [Section ii.], when this jurisdiction became more firmly established, the actual filing of this bill fell into disuse; and that precept, which was before only as *mesne* process after the bill was filed, became in fact as the *original* process, and was (as it now is) sued out in the first instance.

But the practice of introducing of foreign practice.

Still, however, a bill was, and yet is, *presumed* to be first filed; and, in order to shew the nature of the proceeding, the words *by bill* are inserted in the bill of Middlesex; so that the bill of Middlesex ought not to be (though it too often is) taken for the *original* bill, or bill in *trespass*, supposed to be filed.

Introduction of foreign practice.

As one innovation generally introduces another, the necessity even of suing out the *bill of Middlesex*, in order to warrant the *latitat*, and which was formerly strictly adhered to [Section ii.], was gradually dispensed with; and unless the bill of Middlesex was actually wanted on account of the defendant residing in that county, it became the practice to sue out the *latitat*, in the first instance, into the county where he was to be found. Now, therefore, *two* essential things were *presumed* to have been done, in order to authorise this *latitat*; namely, the *original* bill, or bill in *trespass*, to have been filed, and also a bill of Middlesex to have been sued out, and returned *non est inventus*.

The ancient practice.

Strange as these legal fictions and presumptions may at first appear, it is upon them that the present practice of commencing suits by *bill of Middlesex* and *latitat* is founded. If the defendant, therefore, live in Middlesex, the first process is now a bill of Middlesex. If he is to be found elsewhere, the first process is a *latitat*.

Characteristics of the original bill, or bill in trespass.

Such, then, is the general description of the ancient and modern mode of proceeding by *bill* in common cases; a mode very different from any other proceedings by bill, either in this court or the court of Common Pleas. Which difference is clearly discernible, if the particular characteristics

(a) It was not till the reign of George the Second that law proceedings were in English; when, by the 4 G. 2. c. 26. they were directed so to be, and also to be written in a common legible hand and character, and not in court-hand.

of this *original* bill, or bill in *trespass*, be attended to.—
For,

1st, In this bill it was absolutely necessary to allege a *trespass* committed,—which is not the case with other bills.

2d, This bill is *peculiar to this court*; whereas the proceedings by bill against attornies, members of parliament, and the like, are equally used in the court of Common Pleas.

3d, This bill is *founded upon the original jurisdiction* of this court, as the court of *criminal* judicature; whereas other proceedings by bill, are either founded upon the jurisdiction of courts in general, over their own immediate officers and prisoners, or are given by statute.

4th, This bill is used in all *common* actions, between common persons; whereas other bills are used only in particular cases, where the defendant is a privileged person, or a prisoner in actual custody.

But it is observable, that although this way of bringing an action by *bill*, is the general mode of proceeding in this court, in all common cases, and is founded upon its own *original* jurisdiction; yet the court of King's Bench may also take cognizance of any *personal* action, by virtue of a *derivative* or *delegated* authority from the court of Chancery.

Another Way, therefore, of bringing an Action in this Court, is by ORIGINAL WRIT.

In some cases, indeed, it is absolutely necessary to proceed by original; and in others, it is sometimes advisable. [See *post*. Chap. v.]

The mode of proceeding by *original* is the same as in the court of Common Pleas, founded upon the same kind of original writ, and prosecuted nearly in the same way; only, with this difference, that in that court, (as will be shewn,) it is not customary in *common* cases actually to sue out any original; but the process by *copias* issues in the first instance; whereas in proceedings in this court by original, the *real* original writ must *actually* be sued out before any process can issue; it is therefore more properly called, proceeding by *special original*.

Upon the whole, then, we find, that there are two ways of bringing an action in this court, in *common* cases, (*i. e.*) by one common person against another, where the defendant is not a prisoner in actual custody; viz.

1st, By BILL,—called, for distinction sake, the *original* bill, or bill in *trespass*, which is a proceeding founded upon the *original* jurisdiction of this court.

2d, By ORIGINAL WRIT, or, more properly, by *special original*; which is a writ issuing from the court of Chancery,

The other modes
of proceeding in
this court in
particular cases.

Chancery, *delegating* to this court an authority to proceed in the action.

It now remains to explain the several ways of bringing actions in this court in such cases as may be deemed *exceptions* to the above general mode of proceeding; but as the present Volume only relates to the bringing and prosecuting of actions in *common* cases, we shall here content ourselves with the mere enumeration of these several other methods of proceeding, without attempting any explanation thereof, which will be found at large in the Second Volume of this work.

(A. 2)

(A. 2) *The several Ways of bringing Actions in this Court in particular Cases.*

Besides the two modes of proceeding as abovementioned, which relate to common cases, actions may be brought in this court:

Against pri-
soners.

3d, By bill against *prisoners*; the mode used in all cases where the defendant is a prisoner in *actual* custody of this court.

Against attor-
nies, &c.

4th, By bill against *attornies*, or *officers of the court*. The mode used whenever an action is brought *against* such attorney or officer.

By attornies,
&c.

5th, By *attachment of privilege*; the mode used when an action is brought *by* such attorney or officer.

Against peers,
&c.

6th, By bill against *peers* and *members of parliament*; a mode given by the statute 12 & 13 W. 3. c. 3, before which all proceedings against them were by *original*.

Such are the several ways of bringing actions in this court in particular cases; upon which, as they will be more fully treated of hereafter, no further observation will in this place be made, than that the several last-mentioned modes of proceeding by *bill*, are all different from the mode of proceeding by bill in *common* cases; nor do they possess one of those criterions abovementioned, by which the latter bill is peculiarly marked and distinguished.

(B)
In C. B.

(B) *Of the several Ways of bringing Actions in the Court of Common Pleas.*

(B. 1)

(B. 1) *In all common Cases.*

1. *By Original and Capias.*
2. *By Original quare clausum fregit, and Summons.*

The court of Common Pleas does not possess any *original* jurisdiction; nor has it, like the court of King's Bench, any mode of proceeding, in *common* cases, peculiar to itself.

Its

Its authority is founded on original writs, issuing out of the court of Chancery, (the same as those before mentioned, by virtue of which the court of King's Bench also sometimes takes cognizance of actions,) which original writs are the king's mandates for the parties to proceed in the determination of the causes mentioned therein. (Sect. iii.)

The reason of original writs issuing out of Chancery is, because, when the courts were united, which was formerly the case [Section i.], the Chancellor held the seal; therefore, when they were divided, he still keeping the seal, sealed all original writs. *Gilb. C. P. 3.*

In all personal actions, therefore, brought by and against common persons, the only way of proceeding in this court is by original.

Formerly it was absolutely necessary (as it is now in proceedings in B. R. by original, and sometimes in this court) to sue out the original writ before any *capias* could issue against the defendant, which was only *mesne process* to bring him into court: but now the actual suing out of the original writ is dispensed with in all common cases, and the *capias* goes, in the first instance, against the defendant.

An alteration, similar to that in the King's Bench, of the bill of Middlesex, or *latitat*, as before observed, being issued without any original bill previously filed.

But if it be the intention of the party to proceed to *outlawry*, then a special original must be properly sued out; and the mode of proceeding according to the ancient practice strictly adhered to; so, if judgment be by *default*, and a writ of *error* brought, a special original must be taken out, and filed, to warrant the proceedings; but the want thereof is cured after *verdict*.

Otherwise the common *capias*, without any original actually sued out, though *presumed* to be so, is the usual way of commencing an action in this court in all common cases.

There is, indeed, one other way of proceeding in this court in common cases, which is sometimes used.

It is called, proceeding by original *quare clausum fregit*. (See Sect. iii.) Let it suffice here to observe, that this method of proceeding is grounded, in point of law, upon the same kind of original writ as the usual proceeding above-mentioned by *capias* is; the only difference between them being in the *mesne process* after the original is sued out, or at least *supposed* so to be; for in this last case also, the special original is not actually sued out in the first instance.

Instead of the process to compel the appearance of the defendant, being by *capias* against his person, it is, in this case, by *summons* and *distress* against his goods. In a word,

Its authority delegated.

Why originals issue from the Chancery.

[Section i.]

1st, Of proceedings in C. B. by original and *capias*.

Original not really sued out;

except in particular cases.

2d, Of proceeding by original *quare clausum fregit*. [Section iii.]

By summons and distress.

The advantage thereof.

it is the same as the ancient mode of proceeding in this court was, before the general introduction of the *capias*; which was originally allowed but in few cases, and those favouring of criminal offences, but was afterwards extended to all civil actions. The advantage and use of this mode of proceeding, by *original quare clausum fregit*, is, where a defendant has effects which can be distrained, but he himself cannot be met with to be personally served; the process by *capias* requiring personal service, which is not required in the process by *summons*.

There are two ways of proceeding, therefore, in this court in common cases, viz.

1st, By ORIGINAL, and *capias* founded upon the original.

2d, By ORIGINAL, and *summons* and *distrain* founded upon the original, which is commonly termed, by way of distinction, by original *quare clausum fregit*.

It is to be observed, that the above mode of proceeding by original, relates only to actions between common persons.

For when any attorney, or officer of this court, either sues, or is sued, the proceedings originally commence in this court, and have no foundation in Chancery.

So proceedings against peers and members of parliament may be either, as at common law, by original, or agreeable to the statute 12 & 13 W. 3. c. 3. by bill.

But as the mode of proceeding in these particular cases will be fully considered in the Second Volume, we shall, in this place, merely enumerate, (without any further comment,)

(B. 2)

(B. 2) *The several Ways of bringing Actions in this Court, in particular Cases.*

Against attorneys.

A third way of commencing an action in this court is,

3d, By *bill*,—used in all actions against the *attornies* and *officers* of this court; which method is grounded upon the common law of the land, the general jurisdiction of courts over its own officers, and the established custom of this court, used and approved time out of mind.

4th, By *bill*, used in proceedings against *peers* and *members of parliament*; which method is given by stat. 12 & 13 W. 3. c. 3. but see as to peers *Lonsdale v. Littledale*, 2 H. Bl. 267—299. And lastly,

5th, By attachment of privilege, which may be used in all cases where any attorney or officer of the court is plaintiff in the action; which method is likewise grounded upon the acknowledged privilege of such officers, and the long-established custom of the court.

THE PRACTICE OF THE COURTS

King's Bench and Common Pleas.

CHAPTER I.

SEC. I. *Of the Terms, and particular Days in the Terms.*

SEC. II. *Of Attornies.*

SECTION I.

Of the Terms, and particular Days in the Terms.

(A) The Effoin Day.

(B) The Day of Exception.

(C) The Day of the Return of Writs, or Returna Brevium Day.

(D) The Day of Appearance.

(E) Dies non Juridici.

THE Terms are those times or seasons of the year in which the Courts of Law sit for the dispatch of business. The Terms, what.

Writs were always returnable at certain stated days in different seasons of the year. These Returns, or *Termini ad Quos*, when they fell very near together, collectively constituted a period of legal business, which was called generally *Terminus*, or *Term*. Derivation thereof.

VOL. I.

B

The

Their origin.

The division of the year into Term and Vacation has been the joint work of the *Church* and *Necessity*. The cultivation of the earth, and the collection of its fruits, necessarily required a time of leisure from all attendance on civil affairs; and the laws of the *Church* had at various times assigned certain seasons of the year to an observance of religious peace, during which all legal strife was strictly interdicted. What remained of the year not disposed of in this manner was allowed for the administration of justice. The *Anglo Saxons* had been governed by these two reasons in distinguishing the periods of Vacation and Term; the latter they called *Dies Pacis Regis*; the former, *Dies Pacis Dei et sanctæ Ecclesiæ*. The particular portions of time which the Saxons had allowed to these two seasons were adhered to by the Normans, together with the Saxon usages, and continued until altered from time to time by future statutes. In the latter part of the Saxon times, and in the reigns of William the Conqueror, Rufus, and John, the Terms were almost in the same state as they are now, and by them the returns of writs and appearances were governed. 1 Reeve, 191. 3 Black. Com. 277.

By what courts they are observed.

The only courts confined to the Terms are the courts of King's Bench, Common Pleas, and Exchequer (the highest courts at common law). The court of Chancery is not; nor are they observed by the high court of Parliament, the Privy Council, the court of Lord High Steward, or the inferior courts. And it is said, that the Exchequer may sit out of Term. Mad. 551.

Their number and names.

Of these Terms there are four in every year, viz. *Michaelmas Term*, *Hilary Term*, *Easter Term*, and *Trinity Term*. The times when they respectively begin and end may be seen in the Table of the Terms and Returns at the end of this Chapter.

Their kinds, fixed and moveable.

The two first of these Terms are called *Fixed Terms*, as invariably beginning on certain fixed days in the year; and the two last, *Moveable Terms*, their commencement being regulated by *Easter Day* and *Corpus Christi Day*, both of which are moveable feasts, not falling on any certain fixed days.

Issuable Terms.

Also two of the Terms, namely, *Hilary* and *Trinity*, are called *Issuable Terms*; because in them the Records are for the most part made up of the *Issues* joined in the various causes depending, and which are to be tried at the assizes that respectively follow these Terms.

The first day in Term is, in law, the day that is called the *Essoin* Day, of which an account will be presently given; but the courts do not sit till the *Quarto Die post*, and if that be Sunday, not till the Monday following.

Which the first day in Term.

The Term regularly is esteemed as one day; and therefore if a deed be said to be inrolled in such a Term; it shall be intended the first day. So if a Declaration be intitled generally of a Term, it shall be deemed a Declaration of the first day of the Term.

The Term deemed as one day.

But where the day is material, it may be alleged that the thing was done on such a particular day in the Term; and it may be pleaded specially according to the fact, or evidence thereof given upon the trial, agreeable to the maxim, *Fictio cedit Veritati*.

Except it be material to the justice of the case.

There are four particular days in Term; the *Essoin* Day, the *Exception* Day, the *Return* Day, and the *Appearance* Day, called the *Quarto Die post*.

Of the particular days in the Term.

In all *personal* actions, the process according to the ancient institution was, first, for the sheriff to summon the defendant; which was done either personally, or the summons was left at his house; and the sheriff returned either *Summoneri feci*, or *Nil habet in Ballivâ meâ per quod summoneri potest*; on this summons the party either appeared, or *essoined*, or made default; if he appeared, the plaintiff proceeded against him, and defendant pleaded. If he *essoined* (that is, sent his *excuse* for not appearing), the excuse was to be sent on the day the writ was returnable; for if he omitted that day, plaintiff's *exception* might be entered the next day to his non-appearance, and he might have an order that the defendant's *Essoin* non recipiatur; and from this *exception*, so taken and entered, the *second* day, after the return of the writ, was called the Day of *Exception*. The *third* day the sheriff returned his writs into court, which were delivered into the custody of the *Custos Brevium*; and then it was that the court was seized of the cause by the possession of the writ. The *fourth* day was called the *Appearance* Day, or *Dies Amoris*; which was the time granted *ex gratiâ* for the party to appear. If the party did not then appear, the plaintiff offered himself and the Filazer recorded his appearance, and the return of the summons by the sheriff, and defendant was proceeded against by attachment and distress infinite, or by *Capias* as the nature of the case might warrant. Gilb. C. P. 13.

Such is the general explanation of the particular days abovementioned; but as it may be too concise to convey a sufficient idea of their nature and meaning, we will proceed to give a more full account thereof. And first, of

(A)

(A) The Effoin Day.

Its derivation.

Effoin is derived from the French *effoiner*, or *exonier*, to excuse; and is an allegation of an excuse from one that is summoned, for his not appearing and answering to the action.

These effoins, or excuses, were allowed by the law, to the end that no person might be surprised or prejudiced by his absence, provided he had just cause to be excused by any thing that was not owing to his own default. Booth, 14.

Of the different kinds of effoins.

There were five kinds of effoin: 1. *De servitio Regis*, being in the king's service. 2. *In terram sanctam*, being absent in the Holy Land. 3. *Ultra mare*, being beyond sea. 4. *De malo lecti*, being ill in bed; and 5. *De malo veniendi*, being seized with sudden illness or infirmity on the way; this last was called the common effoin.

When allowed.

These effoins were allowed not only in *real*, but in *personal* actions; and all persons might effoin themselves except *minors*, disseisors, and a few others.

But there could be no effoin on a special *capias* where the sheriff is not to summon but arrest the party. *Bazelay v. Earle*. 2 Str. 1194.

At what time, and in what manner named.

The time for making the effoin was, as before observed, the first day; that is, on the return of the writ; but it was sometimes even allowed on the second or third day, if no *exception* was entered by the other party.

The mode of making, or, as it is termed, *casting* an effoin, was in open court, before the justices, who sat on that day for the purpose of receiving the effoins; they were made by the servant of the party effoining, or by a *nuntius* or messenger, or a person called an *effoinator*, according as the case might be; for particular effoins were cast by particular persons.

But it could not be cast by an attorney for the party; for if he had appeared by attorney, it was sufficient, and there could be no effoin. *Anson v. Jefferson*. 2 Wil. 164.

Of the proceedings thereon.

If, at the first summons, the common effoin *de malo veniendi* was cast, it was the ancient practice for the complainant, upon his appearing in court, (provided he doubted the truth of the effoin or excuse,) to demand from

(A) SEC. I.] THE ESSOIN DAY.

5

from the *essoinator*, or person who made it, a lawful proof of the essoin on the very day; or that he should find *pledges*, or make a solemn engagement to bring a warrant or proof of the essoin; that is, the principal summoned, at a day appointed. And attachments issued against the *essoinators tanquam falsarios*, if they failed in the performance of the engagement they had made for their principal. But so early as the reign of Henry III. we find this practice disused; and except in particular cases, of barons and other great persons, who could well command a security, and upon whom the law still imposed the burden of finding pledges, *essoinators* were not required to give any security, but merely pledged their faith, to which credit was always given, that they would produce their principal at another day, to warrant the essoin, and prove it upon his oath.

1 Reeve, 116.

1 Reeve, 406.

In the above manner might the tenant or defendant be *essoined* three times successively; and if he did not come at the third day, nor send an *essoin*, the court awarded that he should appear on another day, in person, or by a sufficient attorney (or *responsalis*, as he was then called), who would be received *ad lucrandum vel perdendum* in his place. If the party summoned, appeared on the fourth day after three *essoins*, and avowed them all, he was required to prove the truth of them by his own oath and that of another, and on the same day was to answer the action; and if he did not appear on the fourth day, nor send his attorney, his land was taken into the king's hands.

How often
essoined.

1 Reeve, 115.

What done on
appearance.

Consequence of
not appearing.

The law respecting *essoins*, of the time of casting them, and by whom, and in what order; for there was a particular order also in which they were to be cast, was very intricate; and in former times, when the parties were anxious to take every advantage of the practice, was much studied and attended to.

The law of
essoins intricate.

Great and grievous was the delay occasioned by this practice. In one instance, indeed, it was carried to an intolerable length; which was, where there was an *essoining simul et vicissim*, or, as it was called, a *fourcher by essoin*: thus, when a *præcipe* was brought against two or more tenants, and after each had had one *essoin*, which was by law due to them, they further delayed the demandant by *alternately* successive *essoins*. As for instance, a *præcipe* is brought against A. and B.; A. is *essoined*, and B. appears, and hath *idem dies* given him, that is, some future day for his appearance; at which

Delay great,
especially by
fourcher by essoin.

2 Reeve, 122.

3 Inst. 250.

day A. appears, and B. is effoined, and A. hath *idem dies* given him; so far was usual: but then at the last mentioned day given, A. is effoined again, and B. appears, and so on alternately; this was called *fourcher*; that is, to *divide*, because they divided themselves in delay of the demandant by effoins and appearances interchangeably. This custom was carried to such excess, that in the reign of Edw. I. the legislature thought proper to interpose, and put a stop to it, by enacting, by the 3 Edw. I. c. 1. and 6 Edw. I. c. 10. that such tenant shall no more *fourch*, but have only *one* effoin.

Practice of
effoining ex-
ploded.

As this practice of effoining (than which there could not perhaps be a greater grievance in judicial proceedings) is *nearly* exploded, and the law thereon become almost obsolete; it might be thought useless to say more upon the subject: the above being sufficient both to explain the nature and meaning of those days in the Terms, called *Effoin Days*, of which frequent mention is hereafter made, and to shew, in this instance, (as may be found in many others,) the great superiority and liberality of the modern practice, when compared with the ancient.

In what cases
effoins may be
now cast, and
how.

But although the practice of *effoining* is nearly, yet it is not *wholly*, disused. In *real* actions, effoins may still be cast, which are entered in the office of the *Clerk of the Effoins*, where also the demandant, or plaintiff, may enter a *ne recipiatur*, if the effoin be not made in time.

In what not.

But it is now settled, that there can be no effoin in a *personal* action. *Argent v. the Dean and Chapter of St. Paul's.* E. 23 G. 3. *Rooke v. the Earl of Leicester.* 2 D. & E. 16.

Nor is a corporation entitled to an effoin. *Id.*

Of proceedings
on an effoin,
and delivering
declaration.

Where an effoin is cast, the parties should adjourn it to a particular day; but if that be not done, nor any motion made to quash the effoin, the plaintiff may still deliver his declaration on the first day of the following Term, but not before, nor will defendant be entitled to an imparlance. For the defendant is never entitled to an imparlance where the plaintiff is prevented from declaring before the Effoin Day, by an effoin cast. *Rooke v. the Earl of Leicester.* 2 D. & E. 16.

The modern
practice of
opening the
courts on the
Effoin Day.

It is observable, that agreeable to the old practice, some one of the judges of the respective courts still continues to go down to Westminster on the Effoin Day of each Term, in order to open the courts, and to take
effoins,

(A) SEC. I.] THE ESSOIN DAY.

essoins, should any be offered; though they do not fit for dispatch of business till the *Quarto die post*.

The different essoins.

For the respective Esoin Days preceding the respective Terms, see the Table of Terms and Returns at the end of this Chapter.—There are also other Esoin Days in the Terms, as many as there are return days. But by the Esoin Day generally speaking, is to be understood, the first Esoin Day in each Term.

The Esoin Day is, in law, the first day of Term, the *Quarto Die post* being merely a day of grace. *Walter's case*. 1 Bul. 35.

Esoin Day first day of Term in law.

Judgments relate, therefore, to the Esoin Day. *Ib.*

Judgments relate thereto.

A judgment of Hilary Term had precedence to a statute acknowledged between the Esoin Day and the *Quarto Die post*. *Stanford v. Cooper*. Cro. Car. 102.

But if the Esoin Day happen to be Sunday, the judgment can only relate to the first judicial day. *Davis v. Salter*, Sal. 627.

A writ pleaded as sued out on a day, between the Esoin Day and *Quarto Die post*, held good on demurrer; for though the courts do not in fact sit till the *Quarto Die post*, yet in law the Esoin Day is considered as the first day in Term. *Bell v. Broadbent*. 3 D. & E. 184.

A writ well sued out between Esoin Day and *Quarto Die post*.

(B) The Day of Exception.

(B)

Of this day, sufficient explanation has been already given. It being nothing more than the day next after the Esoin Day, when the demandant or plaintiff might enter his Exception, and obtain an order called a *Ne Recipiatur*, that the tenant's or defendant's essoin or excuse should not be received, in case such essoin had not been put in, in due time, on the Esoin Day. Gilb. C. P. 13.

Of the Day of Exceptions.

This *Ne Recipiatur* may still be entered at the Clerk of the Esoins, in all actions, in which essoins are allowed.

Of the *Ne Recipiatur*.

(C) The Day of the Return of Writs, or Retorna Brevium Day.

(C)

It has been before observed, that writs were returnable at certain stated days in different seasons of the year: but it does not appear that there was any precise rule requiring a writ to be returnable at any one of these stated days in preference to another. There seems, however, to have been some difference in the early times

How returns regulated formerly.

a Reeve, 56.

Of the stat. of
Dies Communes
in Banco.

The uncertainty
of the ancient
practice.

Returns regu-
lated by subse-
quent statutes.

times of our law, between the length of time allowed to persons summoned, to appear in. In a law of one of our Saxon kings (Ethere), it is directed, that if the party dwelt one county off, he should have one week; if two counties, two weeks; and so for every county a week. The same is laid down by a law of Henry I. with a restriction not to go beyond the fourth week, *ubicunque fuerit in Angliâ*; but if the party were beyond sea, he might have six weeks. There is no intimation, either in Glanville or Bracton, of any such rule prevailing in their times. It is probable, that the returns in the time of the latter might nearly correspond with the scheme laid down by the stat. of *Dies Communes in Banco*, which passed in the 51st year of Henry III. But this act does not give us entire satisfaction on that head; for being only a direction to the justices in Bank how to fix the returns of process which they issued, in consequence of the *return of some other writ*; we are still uninformed as to the rule that governed in the return that was to be affixed to *original writs*. These we know might be obtained in the office of the Chancery any day in the year. Whether they were made returnable at the pleasure of the clerks who penned them, or, as is more probable, at the option of the purchaser; or whether a certain rule subsisted in the Chancery-office on this head, we are not able to collect. But when the original was once returned in *Banco*, the rule for making the return of process upon it, and process upon that process, was prescribed by the stat. of *Dies Communes in Banco*.

The ancient mode, therefore, of regulating the precise returns of *original writs*, is hidden in obscurity; and the assertion to be found in many books, and, among others, in Black. Comm: vol. 3. p. 277. that the returns of original writs "were *certainly settled* as early as the stat. "51 H. 3. ft. 2." meaning the statute of *Dies Communes in Banco*, is erroneous; since that statute has nothing to do with the return of the *original writ*, but only settles the returns of the future process, founded upon such original writ *after* the original writ itself had been returned.

Since the statute of *Dies Communes in Banco*, other statutes have been made relating to the returns of the respective Terms, particularly the statutes of 16 Car. 1. c. 6. and 24 G. 2. c. 48. regulating the returns of Michaelmas Term, and 12 H. 8. c. 21. regulating the returns of Trinity Term,

(C) SEC. I.] THE RETURN DAY.

9

As it is intended to treat hereafter more at large of the teste and return of writs, it may be sufficient at present to add a few general observations on the subject.

Observations upon the Returns, as now settled.

In every Term there are stated days, called days in bank, *Dies in Banco*, upon some of which all original writs must be made returnable; they are therefore called the General Returns of that Term. They are at the distance of about a week from each other, and have reference to some Saint-day or festival, near which they fall. These returns are frequently inserted in the almanacks, and may be seen in the table hereto subjoined. But it is to be observed, that only *original* writs, and such other writs as are grounded upon them, are to be made returnable on these *general* return days; and as, in many cases, it is now usual not to sue by *original*, but by *bill* or attachment of privilege, as will be presently shewn, there are other return days, called *particular* return days, on which all other writs, except originals, or those founded upon them, may be returned.

Dies in Banco, what.

General Returns, what.

Particular Returns.

These particular returns may be made on any day in the Term, except Sundays, and a few other days, called *Dies non Juridici* (for which see post, E.); they express the particular day in the process, and bear reference to the general return day immediately preceding, and are said, therefore, to be made returnable on a day *certain*.

As for instance, The general returns of Michaelmas Term, are on the morrow of All Souls, on the morrow of Saint Martin, and so on. Now if the plaintiff sue by original writ out of Chancery, or by any writ grounded thereon, such writ must be made returnable on the morrow of All Souls, or one of these *general* return days, agreeable to the time when it was sued out. But if he sue by bill, or attachment of privilege, he must make it returnable on some *particular* day, or day *certain*; as on Monday, or Tuesday, or Wednesday, next after the morrow of All Souls, or after the morrow of Saint Martin, or the like, as the case may be.

When, and how used.

Indeed, a *general* return day may be made a *particular* return day, and process, by bill, &c. be returnable thereon; as thus: "On Tuesday, the morrow of All Souls," (by mentioning the day of the week,) which may sometimes be expedient to gain time.

This rule of making writs and process returnable, according to the nature thereof, upon general or particular return days, must be strictly attended to in both courts.

The

What writs should be returnable in both courts on general return days.

The writs which must be made returnable on a general return day, are

In B. R.

All writs of *capias*, *alias*, and *pluries*, grounded upon originals out of Chancery, and all writs subsequent thereto to the outlawry. Writs of *scire facias quare executionem non*, et *ad audiendum errores*, upon writs of error out of the Common Pleas, or other inferior courts; writs of *capias ad satisfaciendum*, *feri facias*, and other judicial writs, after judgment affirmed. Writs *De Retorno habendo Capias in Withernam*, and all other writs and process grounded upon any *recordari facias loquulam*, *audita querela*, *accedas ad curiam*, *capias si laicus*, and every other judicial writ out of Chancery.

In C. B.

All writs of *capias*, and other writs issuing out of this court, grounded on original writs out of Chancery. For which reason, the writs in this court are, for the most part, returnable on general returns. Their common process, by *capias ad respond.* being founded on an original writ out of Chancery, as will be shewn hereafter. But it is otherwise in proceedings by, or against, the officers of the court, as by *attachment* or *bill*.

In B. R.
General Returns
should be wherever,
&c.

N. B. In the King's Bench, whenever a writ is made returnable on a general return day, it should also be with an "*ubicunque*," as it is called; that is, instead of making it returnable on that day at *Westminster*, it should say, "*wheresoever we shall then be in England*;" as "*on the morrow of All Souls, wheresoever*," &c. For that court is removeable with the king at his pleasure. But in the Common Pleas it is otherwise, and the writ is made returnable before the king's justices at *Westminster*, that court being fixed by *Magna Charta*, and not removeable without previous notice given, agreeable to 2 Edw. 3. c. 11. [Introduction, Sec. I.]

In all original writs, there should be fifteen days at least between the *teste* and *return*.

Formerly it was necessary that there should be 15 days between the *teste* and *return* of all writs in the *course* of the cause, even of the writs in *execution*, if the action had been commenced by *original*. But as that occasioned great delay, it was enacted by 13 Car. 2. st. 2. c. 2. § 6. that in all actions of *debt*, and all other *personal* actions, and also in all *ejectments*, after any *issue* therein joined, or any *judgment* obtained, in either of the courts, there need not be 15 days between the *teste* and *return* of any writ of *venire facias*, *hab. corp. jurat*; or, *distring. jurat. fi. fa.*

(C) SEC. I.] THE RETURN DAY.

fi. fa. or *ca. fa.* Nor shall the want thereof be assigned for error. But this statute does not extend to any *ca. fa.* whereon a writ of exigent after judgment is to be awarded, nor to any *ca. fa.* against defendant in order to make bail liable.

The writs which must be made returnable, on a *particular* return day, or a day *certain* in Term, are,

In B. R.

All bills of Middlesex, *latitatus*, alias *capias*, *pluries capias*, and all other writs, when the original proceeding was by *bill*; also *habeas corpus super cepi corpus*; *hab. corp. ad faciend. et recipiend.* and all other proceedings thereupon, both before and after judgment.

In C. B.

All writs of *attachment*, and writs subsequent thereto, and writs grounded on *bills*, filed against attornies, and such officers of the court, as are entitled to the privilege of the court; as also against members of the house of commons, and writs of *habeas corpora*, and the proceedings thereon.

What writs returnable on particular returns, or days certain.

These *particular* returns may be made, as before observed, even on the *essoins* days, or general returns, by specifying the *particular* day of the week, and so making the return on a day *certain*. But if the *essoins* happens on a Sunday, the writ must be returnable on *Monday* next after, &c.

May be returnable on general return days, if not Sunday.

(D) The Day of Appearance.

(D)

The Day of Appearance, or *Quarto Die post*, is a day of favour or indulgence granted to the defendant to appear in, even four days after he has been summoned so to do, and one day after the writ has been returned by the sheriff, and the court have therefore got possession of the cause. This practice seems to have originated from the feudal law, which always allowed three distinct days of citation before the defendant was adjudged contumacious for not appearing. The proceedings, in case of defendant's appearance, or of his default, will be shewn in the body of the work.

Of the Appearance Day.

(E) Dies non Juridici.

(E)

There are certain days in the Terms, called *Dies non Juridici*, on which care must be taken that no writ be made returnable. Such is the *Feast of the Purification* in Hilary Term, *Ascension Day* in Easter Term, and the *Feast of St. John the Baptist*, if it happen in Trinity Term (unless it be the first day of that Term, namely,

Purification.
Ascension Day.
St. John Baptist

DIES NON JURIDICI. [Ch. I. (E)]

the Friday after Trinity Sunday, for then it is made *Dies Juridicus*, by stat. 32 H. 8. c. 21).

Writs if returnable thercon, void.

Writs returnable on any of those days would be void. So that if a writ be returnable on a *Dies non juridicus*, on which it cannot legally be executed, it shall not be executed the next day, but is void; and if it be executed, and a writ of error brought on the proceedings, they shall be set aside. *Harvey v Broad*, 6 Mod. 148. 196.

Sunday.

Sunday is *Dies non Juridicus*. *Davy v. Salter*. 6 Mod. 252.

What may or may not be done on Sunday.

The award of any judicial process upon a Sunday is void. Sir W. Jon. 156. So the entry of any judgment upon record, *Ib*. So if judgment be given upon a Sunday in an inferior court. *Page v. Faucet*. Cro. Eliz. 227.

So the return of a writ by the sheriff. *Harvey v. Broad*. 6 Mod. 148. 196.

How the courts will notice that day;

And the courts will take notice of this mistake, though it does not appear upon the record, but they are only told of it, *ore tenus*. *Ib*.

and attend to the almanack.

For the almanack is part of the law of the land. 6 Mod. 41. And the court must take judicial notice of the commencement and return days of all Terms. *Davy v. Salter*. 6 Mod. 250.

No process executed on Sunday.

By the stat. 29 Car. 2. c. 7. if any person serve, or execute process, warrant, order, judgment, or decree, on a Sunday, (except for treason, felony, or breach of the peace,) it shall be void to all intents, as if done without process or warrant.

Nor arrest made.

For an arrest therefore on a Sunday, false imprisonment lies. *Wilson v. Tucker*. Sal. 78.

But the person arrested must resort to his action, for the court will not, on motion, discharge him. *Ib*. *Wilson v. Guttery*. 5 Mod. 95.

What might be done before the stat.

Before the stat. 29 Car. 2. all ministerial acts upon a Sunday, were lawful, though not judicial ones; as an arrest by an officer upon process. *Machally's case*. 9 Co. 66. 2 Cro. 280. *Pitt v. Weblay*. 2 Bul. 72.

But Q. taking a person in execution. Godb. 280. *Wail's case*. A person may now be taken in execution on any day but Sunday.

What criminal proceedings allowed.

By the above stat. 29 Car. 2. execution of process, warrant, &c. in cases of *treason, felony, or breach of the peace*, is allowed.

Execution of justice's warrant.

Within this exception, execution of a warrant of a justice of peace for good behaviour, is lawful. *Johnson v. Colyson*, T. Ray. 250. But before the statute, it was held otherwise. *Prinfor's case*. Cro. Car. 602.

If a defendant, arrested on a Saturday, escapes, he may be retaken upon the Sunday, for that is not an execution of process, but a continuance of the former imprisonment. *Jacob v. Dalloz*. 6 Mod. 231.

A retaking on an escape.

But not if the escape be voluntary. *Featherstonhaugh v. Atkinson*. Bar. 373. *Atkinson v. Jameson*. 5 D. & E. 25.

Escape must be wrongful.

So a person may be taken upon an escape warrant on that day. *Parker v. Sir W. Moore*. 6 Mod. 95.

Escape warrant executed.

A person may be arrested on Sunday on the Lord Chancellor's warrant, on an order of commitment for contempt, for he is considered as in custody from the time of making the order; and the warrant is directed to the gaoler, and is in the nature of an escape warrant. 1 Atk. 55. *ex parte Whitchurch*.

An arrest on the Chancellor's warrant.

On that day a person may surrender voluntarily. *Ib.*

A voluntary surrender.

Process on an indictment and attachment for a contempt, may be served. *Ib.*

Process on indictment or attachment served.

A man may be taken on an attachment for non-performance of an award. *Ib.*

The party taken thereon.

A proclamation upon summons may be made, according to the statute 31 Eliz. 3. *Anon*. 5 Mod. 449.

Proclamation on summons.

A citation out of the Spiritual Court may be published at the door of the church, according to the usage of the court, though it cannot be served upon the person. *Semb*. 5 Mod. 450. *Alanson v. Brookbank*. Carth. 504.

Citation out of Spiritual Court published.

So Hue and Cry may be made upon a Sunday. *Wait's case*. Godb. 280.

Hue and Cry may be made.

And if the Hundred refuse to make it, they shall be punished for the neglect. *Ib.*

On the 29th May, Restoration Day, business is not usually done, and only one judge, in general, attends; but business may be done on that day, and in East. 7 G. 3. it being the *last common paper day*, the one judge went through the paper, otherwise the parties could not have had their judgments within that Term. 4 Bur. 2089. And in Easter Term 1797, it happened to be the last day of Term, and business was done as usual.

Restoration Day, how far Dies non, &c.

Dies non Juridici are only accounted so with respect to such matters as must be transacted in court, but not as to business that may be done out of court, or even at a Judge's Chamber. Thus bail above may be put in on a *Dies non Juridicus*. *Baddely v. Adams*. 5 D & E. 170. So if the Rule to plead, &c. expire on a *DIES NON*, defendant is bound to plead on that day. Herein therefore they differ from Sundays. The reason is, because Sunday is no day of business for the sake of the decent observance of the Sabbath, but on other *Dies non Juridici* the offices are open. *Mesure v. Britten*. 2 H. Blac. 616.

SECTION II.

Of Attornies.

- (A) Of the Origin of the Practice of prosecuting and defending by Attorney.
- (B) Of the Warrant of Attorney to prosecute and defend.
- (C) Of the Memorandum or Minute of the Warrant.
- (D) Of the Clerkship of Attornies.
- (E) Of their Admission and Practice.
- (F) Of taking out their Certificates.
- (G) Of delivering and taxing their Bills.
- (H) General Rules and Observations respecting Attornies.

The ancient practice of suing and appearing in person.

FORMERLY, actions were prosecuted and defended by the plaintiff and defendant in *person*; they themselves appeared in court to make and plead to the charge, or demand, which was the object of the suit; nor was it allowable (except in particular cases) to appoint an attorney. The modern practice is otherwise; attornies are now generally allowed; actions are, for the most part, conducted by them on behalf of the parties; and it would be looked upon as singular for a person (not being an attorney) to prosecute, or defend his own suit; though any one is still at liberty so to do, there being no law, however custom may be, to the contrary. See *La Grue qui tam v. Penny*. 2 H. Blac. 600. where it was lately done.

Such a difference between the modern and ancient practice, may at first appear not a little remarkable; and it may be deemed neither useless nor unsatisfactory, briefly to explain the origin and reason of the present prevailing practice of appointing attornies; how they were, and still ought to be, appointed; what is necessary for them to do as evidence of such appointment, and to what restrictions and regulations attornies are at present subject.

(A) The

(A) The Origin of the Practice of prosecuting and defending by Attorney. (A)

By the policy of the common law, says Lord Coke, that suits might not increase and multiply, *cum lites potius restringende sunt quam laxande*, both plaintiff and defendant, or demandant and tenant, in all actions, whether real, personal, or mixed, appeared in *person*, as well in courts of record, as not of record, by reason whereof, he adds, *there were but few suits*. 1 Inst. 128. 2 Inst. 249.

The parties formerly appeared in person.

But the king, by his prerogative, might have authorized either party to appoint an attorney, which was done by a certain special warrant, called a *dedimus potestatem de attornato faciendo*; and if the judges refused to admit such person, by his attorney, the writ *de attornato recipiendo* was sued out to compel them so to do. F. N. B. 59. 367.

Unless the king, by writ or letters patent, authorized an attorney.

In particular cases, also, the justices might suffer a deputy, or agent, to prosecute or defend the suit for the parties concerned; but this deputy was not called *attornatus*, or an attorney; but a *responsalis*. The latter differed from the former, both in the mode of appointment, and in the extent of authority. The *attornatus*, or attorney, was appointed by virtue of the king's warrant or writ; and that, instantly upon, or (if for the plaintiff) even before, the commencement of the suit. The *responsalis* was appointed by the justices in open court, not until the suit was commenced, and the party had appeared, for it was necessary that the person appointing such *responsalis*, should be present, and make the appointment before the justices in open court. 1 Reeve, 169.

Responsalis what, and the difference between them and Attornies.

Again, the *attornatus*, or attorney, might be appointed with a general authority to act for the party in other suits and matters; but the *responsalis* was confined to the particular cause then pending. It is clear, therefore, that the *attornatus* and *responsalis* were very distinct in their natures; although it is too common an error to confound them, and to make them synonymous.

Lord Coke, however, endeavours to guard his reader against this mistake. It appears, says he, in Glanville's time, that the justices admitted the parties *per responsalem loco suo ad lucrandum vel perdendum, verum oportet eum esse PRESENTEM in curia qui responsalem ita in loco suo ponit. Et nota DIFFERENTIAM inter responsalem & attornatum*. 2 Inst. 249. 1 Inst. 128.

But

At what period
attornies were
more generally
introduced.

But in time, the rigour of the common law, with respect to the personal appearance of the parties to a suit, gradually abated; and so early as the 13 Edw. I. an act passed, authorizing persons, in certain cases, to appoint attornies; which act has, for the most part, been looked upon as the foundation of the prevailing practice of suing and defending by attorney, and as giving *every person* a liberty of appointing an attorney. Gilb. C. B. 33. 2 Inst. 378. 2 Reeve, 169.

But this was clearly not the case; since by subsequent statutes, 7 R. 2. c. 14. and 15 H. 6. c. 7. this privilege was further extended to other persons mentioned therein; and it was not until even the 29 Eliz. c. 5. that the liberty of appearing by attorney was extended to defendants in penal suits.

It seems, however, that from about that period, namely, the 13 Edw. 1. it became the practice to prosecute and defend suits by attorney; that is to say, by a deputy or agent; an attorney, strictly defined, meaning only a person set in the place of another; accordingly, the language of the warrant is—“*Talis loco suo ponit talem attornatum.*”—By the statutes thus authorizing the appointing of attornies, with a general power, the *responsalis* became of no further use.

The consequence of their
introduction.

The natural consequence of this general introduction of attornies was, their rapid increase, together with a multiplication of suits.

When the statutes, says Lord Coke, gave way to appear by attorney, it is not credible how, with attornies and their multiplication, suits in law, for the most part unnecessary, and for trifling causes, (when the parties themselves might sit quiet at home,) increased and multiplied. So dangerous, and such ill success have ever had the breach of the maxims and ancient rules of the common law. 2 Inst. 249.

Such, indeed, were the inconveniences found to result from this rapid increase of attornies, that the legislature, at different times, interfered; and, by an act of parliament passed in the 33 H. 6. we find their number in Norfolk, Suffolk, and Norwich actually limited, to six in Norfolk, six in Suffolk, and two in Norwich.

Who may now
appoint an attorney.

At present, however, the number of attornies is unlimited; and any person may appoint one to prosecute or defend a suit for him, except such as, by reason of infancy, coverture, or the like, are not supposed to have sufficient legal discretion to make such an appointment.

This

This evidently shews, that originally there was a regular formal method of appointing an attorney, and which, indeed, ought still to be observed.

This leads to the consideration of

(B) The Warrant of Attorney to prosecute and defend.

(B)

When the legislature allowed any person, at his discretion, to prosecute, or appear and plead, by attorney, nothing remained, when an action was about to be brought, or defended by any one, but the appointing of an attorney for the conducting thereof; which appointment was made by a certain written warrant, authorizing such a person, as an attorney, to prosecute or defend the said suit, for and on the behalf of such plaintiff or defendant.

Of the warrant of attorney to prosecute and defend.

Its uses.

This warrant unquestionably answered many good purposes:—To the court, it was evidence of the authority of the attorney employed; to the attorney, it was a voucher of his appointment, and of itself a retainer by his client;—to the subject, in general, it was a beneficial check to the bringing or carrying on of suits in persons' names without their privity or consent.

Of filing the same of record.

That the legislature was aware of the use and importance of these warrants, clearly appears by a statute so early as the 18 Hen. 6. c. 9. where every attorney was subjected to the penalty of 40s. who had not his warrant entered of record in all suits wherein process of attorney was awardable, the same term in which the *exigent* was awarded.

By various other statutes, from time to time passed, as 32 H. 8. c. 30. f. 2.—18 Eliz. c. 14.—and 4 Ann. c. 16. particular times were appointed for the filing of these warrants, and penalties inflicted on default thereof.

When to be filed.

By the last of the above statutes, the plaintiff's attorney should file his warrant the same term in which he declares, and the defendant's attorney the same term in which he appears; and for neglecting so to do, the attorney is liable to the forfeiture of 10*l*.

Forfeiture on default.

But, although such neglect subjects the attorney to a penalty, yet, with respect to the validity of the proceedings, it is sufficient, if the warrant be filed any time *pendente lite*, (i. e.) before final judgment. *Dyke v. Squeering*. 1 Wil. 181. Or, even after judgment, and error brought. *Vincent v. Bodurdo*. 2 Keb. 199.

But proceedings not invalid.

Want of warrant, when aided.

But by the statute of Jeofails, 18 Eliz. c. 14. the want of a warrant is aided after verdict; though, in case of judgment by default, it seems still necessary. 4 Ann. c. 16.

The practice of appointing by warrant now disused.

The practice, however, not only of filing, but even of taking these warrants of attorney, is at this day, for the most part, disused.

Perhaps it would be better otherwise.

A mere parol retainer is deemed sufficient. But perhaps it might be better, and safer, if the old practice in this respect were more strictly attended to, and greater caution used by attornies in procuring a proper authority before they proceed; for, even if a forged power of attorney be imposed upon them, they are responsible for anything they may do under it, however innocently.

Attornies answerable if they trust even to a forged power of attorney, though innocently. They should therefore be cautious.

Thus, in the case of *Robson and Eaton*, 1 D. & E. 59. one Davis, having procured a forged power of attorney, went to Hodgson, and commissioned him to bring an action in C. B. against Eaton, at the suit of Robson. He did so, perfectly innocent of the fraud; and defendant, the action being in plaintiff's name, and seeing upon the record that William Hodgson was the attorney put in by plaintiff, paid the money into court, which Hodgson took out, and paid it over to Davis, who then absconded; after which, this action was brought by the plaintiff himself for the original debt due. Per Lord Mansfield. There can be no doubt upon this case. The attorney, who trusted to the warrant of attorney, is liable; and Davis, who committed the forgery, is liable to him. Judgment for plaintiff.

So should the parties also.

This shews, also, the necessity of caution on the part of the defendant himself; and that it is always advisable to be satisfied, that the action is, in fact, brought at the instance of the real plaintiff; for, suppose the attorney, in the above case, had not been a responsible person, Eaton, the defendant, must have submitted to the loss.

But although no regular warrants may be, at this day, either taken or filed of record by attornies, (strictly speaking, however, by the laws still in force they ought to be,) yet, by a late statute, subjecting every such warrant to a stamp duty, attornies are now enjoined to file a memorandum or minute of such warrant of attorney, at the particular times; and in the manner mentioned therein; as will be more fully explained in the treating of the

(C) Memorandum, or Minute of the Warrant, to prosecute or defend.

(C)

By the 25 G. 3. c. 80. f. 1. every warrant given to any attorney to commence, carry on, or defend any suit where the cause of action shall be above 40s. shall be charged with a stamp duty of 2s. 6d.

25 G. 3. c. 80.
Every warrant to have a 2s. 6d. stamp.

And in order (as the act expresses it) to make suitable provisions for the payment of this duty, it is, by sect. 13. enacted, That no attorney shall sue out any writ or process, or commence or prosecute, or shall defend any suit, or appear for any defendant in any action, (for or in expectation of any gain, fee, or reward,) by virtue of any warrant or authority whatsoever, whether verbal or written, unless such attorney shall have delivered a memorandum or minute, to the proper officer, or his deputy thereby appointed to receive the same, duly stamped with a 2s. 6d. stamp, of such warrant or authority containing the names of the respective parties to the suit, the court in which the same shall be commenced, and also the name of the attorney or agent immediately retained to prosecute, carry on, or defend the same (agreeable to the form therein, and hereinafter prescribed); which memorandum is to be entered, or filed of record, as hereinafter mentioned.

Every attorney prosecuting or defending a suit, to deliver such stamped warrant

By sec. 15. the proper officers, to whom the attornies are to deliver these stamped memorandums, and by whom they are to be duly filed, are on the part of the plaintiff's attorney, the clerk, or person who signs the writ, or first process, and on the part of the defendant's attorney, the clerk, or officer who files the bail, or enters the appearance for defendant; and if bail be put in before a judge, then the memorandum is to be delivered to the judge's clerk before whom such bail is put in.

to the officers to whom they have occasion first to apply in the prosecuting or defending the suit.

S. 21. If plaintiff file common bail, or enter an appearance for defendant according to the statute, he may do so without entering, or filing of record, any memorandum or minute for the defendant.

No such memorandum on appearing for defendant according to statute.

But no attorney shall, after such appearance entered, according to the statute, carry on any further proceedings for such defendant, until the memorandum, or minute of the warrant, duly stamped, be delivered to the proper officer. S. 22.

Except further proceedings taken by defendant.

S. 24. If a new defendant, by any rule or order of the court, be added to a suit after the action be commenced,

If a new defendant added, no new memorandum necessary.

no new memorandum or minute is necessary upon the suing out of process against such defendant.

Memorandum
necessary where
judgment by de-
fault.

S. 19. If any defendant, before appearance, shall confess any action, or suffer judgment by default, a memorandum or minute of such *cognovit* or warrant of attorney, must be delivered to the proper officer, previous to entering up judgment.

Want thereof
not to vitiate
proceedings.

S. 17. Any omission, or defect in the entering, or filing of the memorandum or minute, does not vitiate the proceedings.

But attorneys
forfeit 5l.

S. 16. But the attorney, not conforming to the act, is subject to a penalty of 5l.

Officers not fil-
ing same, forfeit
50l.

S. 15. And if the respective clerks, or officers, who receive the memorandums or minutes, do not pursue the directions in the statute, they are liable to a penalty of 50l.

This duty not to
be charged by
attornies.

S. 20. None of these duties to be charged by the attorney to his client; nor inserted, under any pretence, in the attorney's bill.

But agents may
charge them to
attornies.
Form of the
memorandum
or minute.

S. 21. But agents may charge them to the attornies who immediately employ them.

The form of the memorandum, or minute to sue or defend, to be entered in the respective courts, or filed of record, as prescribed in the schedule to the above act, is as follows:

For plaintiff.

In the court of (insert the name of the court in which the proceedings are to be carried on) in England (or Scotland, or Wales, &c. as the case may be).
Middlesex to wit. A. B. is retained to prosecute by C. D. as his attorney against E. F. (or otherwise as the case may be.)

A. B. plaintiff's attorney.

(If by an agent to the attorney immediately retained, add,)

By G. H. his agent.

Entered, or filed of record,

(As the case may require) this

in the

year of the reign of

day of

(Officer's name).

For defendant.

The like form for the defendant's attorney (*mutatis mutandis*).

In the court of (insert the name of the court as before)

(insert the name of the

Middlesex, to wit. I. K. is retained to defend by E. F. as his attorney, at the suit of A. B.

I. K. defendant's attorney.

(If

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(If by an agent, add,)

By L. M. his agent.

Entered, or filed of record, this _____ day of _____
in the _____ year of the reign of _____
(Officer's name).

N. B. These forms are printed, and may be had at the stationers, or of the officers to whom they are to be delivered, and who generally keep some by them, for which is paid 2s. 7d.

The last words, "Entered, &c." are written, or filled up by the officer whose duty it is to receive the memorandum, and file the same; so that the former part only is necessary to be written or filled up by the attorney.

(D) Of the Clerkship of Attornies.

(D)

By the 2 Geo. 2. c. 23. f. 5. no person can act as an attorney either in his own name, or in the name of any other person, in any of the courts of law, (being a court of record,) unless such person shall have been bound by contract in writing to serve as a clerk for and during the space of five years to an attorney duly and legally sworn and admitted in some or one of such courts; and that such person, for and during the said term of five years, shall have continued in such service; and also, unless such person after the expiration of the said term of five years shall be examined, sworn, admitted, and inrolled as by the said act required.

Of attornies serving their clerkship, how to be bound.

To continue in the service.

To be examined.

Of the affidavit of the contract,

Every person so bound must, within three months next after the date of every such contract, cause an affidavit to be made, and duly sworn, of the actual execution of every such contract by the attorney and the person so bound; and in every such affidavit shall be specified the names of every such attorney and of every person so bound, and their places of abode respectively, together with the day of the date of such contract; and every such affidavit shall be filed within the time aforesaid, in the court where the attorney to whom such person is bound hath been inrolled with the respective officer of such court, (in K. B. the chief clerk of the court, or his deputy; and in C. B. the chief clerk of the warrants of that court, or his deputy,) who shall mark and sign a memorandum or mark of the day of filing such affidavit at the back or at the bottom thereof. 22 G. 2. c. 46. f. 3 & 5.

C 3

N. B.

N. B. As the filing of the affidavit within time is sometimes omitted, an indemnity bill often passes, enlarging the time and curing the neglect.

Of the duty paid on the articles.

Upon the articles of clerkship, certain duties are to be paid in proportion to the premiums given, viz. 6d. in the pound for 50l. or under, and 1s. in the pound if above 50l. which duty is to be paid by the master, 8 Ann. c. 9. s. 32. To be paid within the time mentioned in s. 36. of 8 Ann. In case the duty be not regularly paid by the master, the clerk may pay it, and make the master reimburse it, together with a penalty as mentioned in 18 G. 2. c. 22. s. 24, 25. 20 G. 2. c. 45. and 5 G. 3. c. 4. s. 19.

Of the stamp duty.

But over and above these duties, there is by 34 G. 3. c. 14. a stamp duty imposed of 100l. for every contract to serve as a clerk, in order to his admission as an attorney in any court at Westminster; and 50l. in order to his admission in court of great sessions, or other court of record.

Of inrolling and registering the indenture.

The indenture so stamped must be inrolled or registered with the proper officer of the court, together with an affidavit of the time of the execution of such contract, within six months after execution, or the service shall only commence from the time of such inrolment. S. 2.

Of the affidavit of payment of the duty.

Every clerk, previous to his admission, must make affidavit of the payment of such duty, and the sum paid in respect thereof; and shall insert the name and place of abode of the person, &c. with whom such contract was entered into, the time of execution thereof, and of inrolling or registering the same. S. 3.

One payment sufficient;

One payment of the duty entitles an attorney to be admitted to all the courts; nor is any new duty required from the same clerk, by reason of any subsequent contract with any other master, on the event of the former dying, leaving off practice, or the like. S. 4—8.

and if two parts, only one to be stamped.

Contracts, &c. to be stamped before ingrossed; but if of two parts, one part only need be stamped, and the other may be stamped by commissioners, any time after the execution, on sufficient proof of such duty having been paid. S. 11.

How service to be under the articles.

Every clerk must, during the whole time and term of service to be specified in such contract, continue, and be actually employed by such attorney, or his agent, in the proper business, practice, or employment of an attorney. *Id.* s. 8.

But

But no such clerk can serve the agent of such attorney, under such articles, for a longer time than *one year* of his clerkship; and any service to an agent beyond that time shall not be deemed good service. R. K. B. Trinity Term 31 Geo. 3.

How long clerk may serve his master's agent.

If any such attorney, to whom any clerk is so bound, shall happen to die before the expiration of such term, or shall discontinue, or leave off his practice; or if such contract shall, by mutual consent of the parties, be cancelled; or in case such clerk shall be legally discharged by any rule or order of the court wherein such attorney shall practise, before the expiration of such term; and such clerk shall, in any of the said cases, be bound by another contract in writing to serve, and shall accordingly serve as clerk to any other such practising attorney, during the residue of the said term of five years, such service shall be deemed good and effectual, so as an affidavit be duly made and filed of the execution of such second contract, within the time and in like manner as before directed concerning such original contract. 22 G. 2. c. 46. s. 9.

How in case of master's death, or leaving off business.

No attorney retained or employed as a writer or clerk by any other attorney shall, during the time of such employ, take or have any clerk under articles; and no service to any such attorney, during the time that such attorney shall be so employed by any other attorney, shall be deemed good service. R. K. B. Trinity Term 31 G. 3.

No attorney employed as clerk to another attorney can take a clerk.

(E) Of the Admission of Attornies.

(E)

Every clerk, before he is admitted, must cause an affidavit of himself, or such attorney or solicitor to whom he was bound, to be duly made and filed, that he hath actually and really served and been employed by such practising attorney to whom he was bound, or his agent, during the said whole term of five years, according to the true intent and meaning of this act, 22 G. 2. c. 46. s. 10.

Of the admission of attornies.

Every person intending to apply for his admission as an attorney shall, for the space of one full term previous to the term in which such person shall so apply, cause his name and place of abode, and also the name and place of abode of the attorney to whom he shall have been articulated, written in legible characters, to be affixed on the outside of the Court of King's Bench, in such place as public

Of the notice requisite before admission.

notices are usually fixed, and also to be entered in a book, kept for that purpose at each of the judge's chambers of the court of King's Bench. R. K. B. Trinity Term 31 G. 3. R. K. B. Trinity Term 33 G. 3.

Of the oath.

No person to be permitted to act as an attorney unless he takes the oath prescribed by the act, and is admitted and inrolled. 2 G. 2. c. 23. s. 1.

Of the examination.

The judges are to examine into the fitness and capacity of persons applying to be admitted; and if deemed duly qualified, to administer the oath, and cause him to be admitted, and his name to be inrolled, and his admission written on parchment, and signed by a judge, to be delivered to him. 2 G. 2. c. 23. s. 2.

Of the penalty for acting, or suffering any to act in his name.

No person to act who is not admitted agreeable to the above statute, on penalty of 50l.; and the same penalty for suffering any other person not duly admitted to practise in his name. 22 G. 2. c. 42. s. 12.

How many clerks allowed.

No attorney to have more than two clerks at one time, who shall become bound by contract in writing to serve him as clerks. 2 G. 2. c. 23. s. 15.

Of the punishment for acting as agent to an attorney not qualified.

If any sworn attorney shall act as agent for any person not duly qualified, or permit his name to be used, knowing such person not to be qualified, he shall, on a summary application to the court, be struck off the roll, and for ever afterwards be disabled to practise; and the court may commit him for any time not exceeding a year. 22 G. 2. c. 46. s. 11.

How an attorney of one court may act in the name of an attorney of another court. Penalty for acting without being admitted.

An attorney of one court, with the consent in writing signed by an attorney of another court, may sue out writs and proceed in actions in such other court in the name of such attorney. 2 G. 2. c. 23. s. 10.

Any person suing out any writ, or commencing, prosecuting, or defending any action for gain, fee, or reward, without being admitted and inrolled, shall forfeit 50l. to any person prosecuting. 2 G. 2. c. 23. s. 24.

Rule of court for attorneys to enter their names, &c. in a book at the proper office.

When an attorney is admitted, if he reside in London or Westminster, or within ten miles thereof, he must enter in a book, kept at the Master's office in King's Bench Walks, (in alphabetical order,) his name and place of abode, or some other proper place within the cities of London or Westminster, where he may be served with notices, summonses, orders, and rules; and service of copies of rules, &c. at that place, with any person resident there, or belonging thereto, shall be deemed sufficient (unless personal service be requisite); and if any attorney shall not enter his name, &c. in such book, then the

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23

the fixing up of any notice or copy of any summons, &c. for him in the Master's office, shall be deemed good service. R. K. B. Hil. 8 G. 3.

(F) Of taking out the Certificate.

(F)

Attornies must also take out *annually* a certificate of their admission, inrolment, or register, for which a duty of 5l. is to be paid if resident in London or Westminster, Southwark, St. Pancras, or St. Mary-le-Bon, or within the bills; and 3l. if elsewhere. 25 G. 3. c. 8e.

Of the certificate.

To obtain which, he must deliver in to the proper officer of some one of the courts a note of his name and residence, who are to certify the same, sec. 4. and issue certificates, which are to be renewed ten days before their expiration. Attornies residing 40 days in the year in London, &c. are to be deemed resident there and subject to the 5l. duty.

How obtained.

If any person acts without such certificate, or delivers in a false name or place of abode, he incurs the penalty of 50l.

Penalty for acting without it.

Persons having taken out certificates may act in the name of any other person with his consent, provided such other person has taken out his certificate, but not otherwise. S. 8.

(G) Of delivering and taxing Attornies Bills.

(G)

No attorney shall commence or maintain any action for the recovery of any fees, &c. until the expiration of one month, or more, after such attorney shall have delivered unto the party to be charged therewith, or left for him at his dwelling-house, or last place of abode, a bill of such fees, &c.; which bill shall be subscribed with the proper hand of such attorney. 2 G. 2. c. 23. s. 23.

Of the attorney's bill, and taxation thereof.

When bill to be delivered.

Upon application to any of the judges of the court in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted, the said bill is to be referred to the proper officer of the court to be taxed and settled (although no action shall be then depending in the court touching the same); and if the attorney or party chargeable, having due notice, neglect to attend such taxation, the said officer may proceed to tax the bill *ex parte* (pending which reference and taxation, no action shall be commenced or prosecuted touching the said demand); and if the party do not pay

How to be taxed.

to

to the attorney what is found due, he shall be liable to an attachment or action at the election of the attorney; and if on such taxation it appears that the attorney has been overpaid, he must refund the surplus, or be liable to an attachment or action at the election of the party. 2 G. 2. c. 23. s. 23.

Of the costs of taxation.

The said respective courts are authorized to award the costs of such taxation to be paid by the parties according to the event of the taxation of the bill; (*i. e.*) if the bill taxed be less by a sixth part than the bill delivered, then the attorney is to pay the costs of the taxation; but if it shall not be less, the court, in their discretion, shall charge the attorney or client in regard to the reasonableness or unreasonableness of such bill. 2 G. 2. c. 23. s. 23.

The act of 2 G. 2. not to extend to bills from one attorney to another.

But by the 12 G. 2. c. 13. s. 6. the above act does not extend to any bill of fees due from one attorney to another attorney.

(H)

(H) General Observations relating to Attornies.

Courts strict in enforcing their rules.

The courts are very strict in enforcing obedience to the various acts of parliament abovementioned, particularly respecting the articles, and the time and manner of serving under them previous to admission; insomuch that cases have sometimes arisen where attornies have been struck off the roll many years after their admission, upon some defect being discovered and sworn to in the service of their clerkship, or the like; and although in some instances the courts have thought them very hard cases, yet they have declared it to be out of their power to exercise any discretion, but that they were bound by the strict letter of the act.

This caution cannot be too much attended to.

Exceptions.

There are however cases to be found which may be cited as exceptions to the general rule; but they are at best but exceptions, depending wholly on their own special circumstances. Such are *Fletcher's case*, Blac. 734. and *Carter's case*, Blac. 957.

If an attorney be admitted fraudulently, with the collusion of the master, he will not only be struck off the roll, but the master will also be subject to an attachment. *Hill and Hargrave*. Blac. 991.

Of refunding part of the premium.

If a premium be given with a clerk, and the master soon after dies, or his business much decreases, or any other cause arises why in justice part of the premium should not be restored, the court, upon motion, will refer the

the matter to the master, for him to consider what is proper to be refunded; *Anon.* 1 Barn. 331. 2 Barn. 227. or a court of equity will interfere. *Newton v. Rowse.* 1 Ver. 460.

By a rule of court, Mich. 1654, in both courts no person without rule of court, order of judge and prothonotary, and notice to the adverse party, or his attorney, may change or shift his attorney; and such attorney newly coming in, to take notice, at his peril, of the rules whereunto the former attorney was liable had he continued. *Kay v. De Mattos.* Blac. 1323. *Macpherson v. Rorison.* Doug. 216.

Of charging attorney in the cause.

The court will not suffer the party to change his attorney without first paying the former attorney his bill. 12 Mod. 440. 8 Mod. 306.

All attornies now enter their own pleadings, and pay for their entries, and other fees of office, upon doing the act whereupon the fee accrues due; but formerly, the secondary, who is immediately under the chief clerk, was the superior of the clerks in court; and from thence obtained the denomination of *master*, which is now adopted by the court; and the clerks in court were the agents of the attornies at large, as is now the practice of the plea side of the court of Exchequer, and were accustomed at certain periods of time, after every term, to account with the secondary; which explains the meaning of several rules of court, as East. 15 Car. 2. Rule 3. Trin. 20 Car. 2. and others which are now obsolete. Rules and Ord. K. B. N. 102.

Attornies formerly practised in K. B. by clerks in court.

Master of K. B. whence so called.

Before an action can be maintained by an attorney for his fees, the act of 2 G. 2. c. 23. must be strictly complied with. The bill must be left with his client for at least a month. Where the plaintiff shewed his bill to defendant, though he acknowledged the debt, said he could not pay it, and did not know what to do with the bill; upon which plaintiff took it back. It was held not sufficient. *Brooks v. Mason.* 1 H. Blac. 290.

Of the action for an attorney's bill.

How bill to be first delivered.

If any part of an attorney's bill be for business done in the court, the bill must be delivered accordingly. 2 G. 2. as, "drawing and engrossing an affidavit of debt, in order to hold party to bail, paid for swearing," &c. though the affidavit was never filed, and no writ taken out. *Winter v. Payne.* 6 D. & E. 645.

If any part of bill be for business done in court,

So, although the whole of the bill be for business done at the Quarter Sessions. *Ex parte Williams.* 4 D. & E. 496. *Clarke v. Donovan.* 6 D. & E. 694.

or for business at Quarter Sessions;

But if the whole bill be for conveyancing, it is not within the statute. *Hillier v. James.* Bar. 41.

but not for conveyancing.

Nor

Bills for agency,
how liable to
be taxed.

Nor is a bill for agency within the statute, as it falls within the clause of 12 G. 2. c. 13. s. 6. but it hath been the practice of the courts to refer bills for agency business to be taxed; not indeed under the authority of the above acts, but under the general jurisdiction of the court, and the stat. 3. Jac. 1. c. 7. See the cases in note to *Hooper v. Till*. Doug. 199.

But no bill need
be delivered a
month before
action.

Although, on motion, such bills may be taxed; yet to maintain an action upon them, it is not necessary to deliver any bill, agreeable to 2 G. 2.

By the 12 G. 2. c. 13. s. 6. it should seem as if both parties must be attorneys when the debt was contracted; but it is sufficient if they are so when the action is brought. *Ford v. Maxwell*. 2 H. Black. 589.

After delivering
bill, if not
taxed, not to be
questioned.

After an attorney's bill has been delivered a month, and no application has been made to have it taxed, the defendant will not be permitted to question the reasonableness of the items before a jury. *Williams v. Frith*, and *Hooper v. Till*. Doug. 198.

Attornies not
liable to county
court.
Barrister not ad-
mitted.

An attorney is not liable to be sued in the court of conscience for Middlesex. *Wiltshire v. Lloyd*. Doug. 381.

A barrister cannot be admitted an attorney. Q. Whether he can get first disbarred, and then be admitted? *Ex parte Cole*. Doug. 114.

Attornies under
controul of
court, and sub-
ject to summary
jurisdiction.

Attornies are immediately under the controul and correction of the courts; they are liable to be proceeded against, and punished in a summary way, either by attachment, or by having their names struck off the roll, for any malpractices of which they may be guilty. On the other hand, the courts are ever ready to yield them protection when they are deserving of it.

How favoured
as to their lien.

Thus, they are peculiarly favoured with respect to their lien on all deeds and papers in their hands, and judgments recovered by their clients, which are rendered subject to their bill of costs; so that if the money come to his hands, he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied; nay, he may give notice to the defendant not to pay till his bill be discharged; and a payment by defendant, after such notice, would be in his own wrong, and he would be liable to pay over again to the attorney the amount of his lien. *Wells v. Hale*. Doug. 238. *Read v. Dupper*. 6 D. & E. 361.

To what it ex-
tends.

Parties may
compromise be-
fore notice from
attorney.

But, if the plaintiff compromise the debt and costs with defendant, or defendant pays the same to plaintiff *bona fide* before any notice from his attorney of his lien, it will be good. *Ibid*. 6

So when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care, if the attorney applies, that his bill be first satisfied: As if A. has a judgment against B. and B. has a judgment against A., and B. moves to set off his judgment against A.'s in the taxation of costs, court will not permit it, unless B. first undertakes to satisfy the bill of attorney. *Mitchell v. Oldfield*. K. B. 4 D. & E. 124. *Randle v. Fuller*. 6 D. & E. 456. *Morland v. Hammersley and Lashley*. N. 2 H. Blac. 441.

Lien on judgment for their costs.

And this lien of attorney on the costs and damages recovered is, in K. B., held to be a *general* lien, without any such restriction as seems to be imposed in the court of C. B.; who hold that the attorney has only such a lien as is subject to the equitable claims of the parties in the cause; and therefore, as the principal can only in equity recover the *balance* due to him, the attorney ought not to stand in a better situation; and if no balance be due, the attorney can have no claim on the ground of a lien; and this although the attorney's client is insolvent, and has no other means of paying the bill. *Schoole v. Noble* and others. 1 H. Blac. 24. *Nunez v. Modigliani*. Ibid. 217. *Vaughan v. Davis*. 2 H. Blac. 441. and *Dennie v. Elliott* and another. 2 H. Blac. 587.

In K. B. a general lien.

In C. B. restricted.

So that upon this point the two courts differ in their practice, and seem each to be at present fixed in their several opinions.

Wherein courts differ.

An attorney has a lien on money levied by the sheriff, under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued, to retain the money in his hands; and that the court would be moved to set aside the judgment for irregularity, and notwithstanding a docket has been struck against his client. *Griffin v. Eyles*. 1 H. Blac. 122.

Lien extends to money levied by sheriff.

The court will entertain a summary jurisdiction over an attorney of the court, in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents; but if it appear that a third person is interested in the deeds, the court will take a security from the person to whom they are delivered, to produce them on demand for the inspection of such third person. *Sir Richard Hughes v. Mayne*. 3 D. & E. 275.

Court will order attorney to deliver papers, but will protect interest of third parties.

For further information on this subject, and the privileges of attornies in suing and being sued, see the *Mode of proceeding by and against Attornies*, in the second volume of this work.

A T A B L E OF THE TERMS and RETURNS in B. R. and C. B.

MICHAELMAS TERM

Contains three Weeks and two Days, and hath four Returns.
It begins on the 6th of November, if not Sunday, otherwise the 7th, and ends on the 28th of November, if not Sunday, otherwise the 29th.

The 3d of November is the *Effoin* Day of this Term.

For the regulation of this Term, vide statutes 16 Car. 1. c. 6. 24 G. 2. c. 48.

The Exchequer opens eight days before full Term in the other courts.

BY ORIGINAL.

1. On the Morrow of All Souls.
2. On the Morrow of Saint Martin.
3. In 8 days of Saint Martin.
4. In 15 days of Saint Martin.

BY ATTACHMENT OF PRIVILEGE, BILL, &c.

1. On (*) next after the Morrow of All Souls
2. On () next after 8 days of Saint Martin.
3. On () next after 8 days of Saint Martin.
4. On () next after 15 days of Saint Martin.

* Any day in the week that plaintiff wishes writ to be returnable, except Sunday.

If a *latitat* or *bill of Middlesex* be made returnable in this Term on *Saint Martin's day*, which may be done, it must be thus, on "Tuesday the Feast of St. Martin," specifying the day on which the Feast of St. Martin happens to fall.

HILARY TERM

Contains three Weeks, and hath four Returns.

It begins the 23d January, if not Sunday, otherwise the 24th, and ends 12th of February, if not Sunday, otherwise the 13th.

The 20th of January is the *Effoin* day of this Term.

In the Exchequer, it begins eight days before the full Term in other courts.

BY ORIGINAL.

1. In 8 days of Saint Hilary.
2. In 15 days of St. Hilary.
3. On the Morrow of the Purification.
4. In 8 days of the Purification.

BY ATTACHMENT, BILL, &c.

1. On () next after 8 days of Saint Hilary.
2. On () next after 15 days of Saint Hilary.
3. On () next after the Morrow of the Purification.
4. On () next after 8 days of the Purification.

Writs must not be made returnable on the 2d day of February in this Term, it being a *Dies non Juridicus*.—This is an *issuable* Term.

EASTER TERM

Contains three Weeks and six Days, and hath five Returns.

It begins the Wednesday fortnight after Easter-day, and ends on Monday before Whitsunday.

The

TABLE OF TERMS, &c.

3^d

The Sunday next preceding the Wednesday fortnight after Easter Day, is the *Effoin* Day of this Term, which, falling on a Sunday, is held on the Monday.

In the Exchequer, it begins eight days before full Term in the other courts.

BY ORIGINAL.

1. In 15 days of Easter.
2. In 3 weeks (a) of Easter.
3. In 1 month (a) of Easter.
4. In 5 weeks from Easter Day.
5. On the Morrow of the Ascension.

BY ATTACHMENT, BILL, &c.

1. On () next after 15 days of Easter.
2. On () next after 3 weeks from the day of Easter.
3. On () next after one month from the day of Easter.
4. On () next after 5 weeks from the day of Easter.
5. On () next after the Morrow of the Ascension.

Writs must not be made returnable on *Ascension Day* in this Term, it being *Dies non Juridicus*.

TRINITY TERM

Contains twenty Days, and hath four Returns.

It begins the Friday after Trinity Sunday, and ends on the Wednesday fortnight after it begins, unless that day happens to be the 24th of June, and then on the day following.

The Monday next preceding the Friday after Trinity Sunday, is the *Effoin* Day of this Term.

In the Exchequer, it begins four days before full Term in the other courts.

For the regulation of this Term, vide Statutes 51 H. 3. ft. 2. and 12 H. 8. c. 21.

BY ORIGINAL.

1. On the Morrow of the Holy Trinity.
2. In 8 days of the Holy Trinity.
3. In 15 days of the Holy Trinity.
4. In 3 weeks after the Holy Trinity.

BY ATTACHMENT, BILL, &c.

1. On () next after the Morrow of the Holy Trinity.
2. On () next after 8 days of the Holy Trinity.
3. On () next after 15 days of the Holy Trinity.
4. On () next after 3 weeks of the Holy Trinity.

Writs must not be made returnable on the 24th June (*Midsummer Day*) if it falls in this Term, unless it happen to be the Friday next after Trinity Sunday, then they may by stat. 32 H. 8. c. 21.

This is an *issuable* Term.

N. B. Upon all days in Term (except Sundays, and such as are deemed *Dies non Juridici*, which are specified in the above Table) writs may be made returnable. If *original* writs, or founded on such, then on one of the *general* Return Days: if by *bill*, attachment, or the like, then on a *particular* day in the week immediately referring to the last general Return Day, in manner above-mentioned. But see ante, Sec. I. (C).

(a) In B. R. in these two Returns, it is usual to say *after* Easter, and not *of* Easter. All the other Returns are the same in both courts.

CHAPTER II.

In what Cases Actions are bailable, and of the Consequence of arresting Persons not liable to be arrested, and their Remedy and Discharge.

WHEN an action is about to be commenced, the first thing necessary to be considered is, whether it be *bailable* or not; that is to say, whether the case be such as to authorize the plaintiff to *arrest* the defendant, and keep him in custody, unless he finds good and sufficient sureties, which are called *special bail*; or whether the defendant is only to be served with process, requiring him to appear in court to the plaintiff's charge, on a certain day mentioned therein, and which is afterwards effected by his entering an *appearance* if the suit be in the Common Pleas, or if in the King's Bench, by his putting in or filing what is called *common bail*.

The importance of this previous inquiry must be obvious: Not only the first proceedings in the cause are governed by it; but it is often of the greatest moment to know whether the party can be arrested, as well from the advantages which in cases of emergency arise therefrom, as also to avoid the consequences which may ensue from an illegal arrest.

In order to discover whether the defendant may be arrested and held to bail, or not, it is necessary to consider,

SEC. I. *The Nature of the Cause of Action, and its Object.*

SEC. II. *The Person against whom the Action is to be brought.*

SEC. III. *The particular Circumstances which may render the Case an Exception to the general Rule.*

SEC. IV. *The Consequence of arresting Persons not liable to be arrested, and of their Remedy and Discharge.*

SEC. I.

SECTION I.

The Nature of the Cause of Action, and its Object.

ACTIONS are either *personal, real, or mixed.*

Personal actions are such whereby a man may claim, first, a debt, or personal duty, or damages in lieu thereof; or, secondly, a satisfaction in damages for some injury done to his person or property. Different kinds of actions personal.

Real actions, which concern real property only, are such whereby a man claims title to any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. But these are now much disused, since a more expeditious method of trying titles hath been introduced by other actions; personal and mixed. Real

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained, as ejectment and waste. 3 Black. Com. 117, 118. Mixed

Under these three heads may every species of remedy, by suit or action in the courts of common law, be comprised; but it is to the first of these, namely, to *personal* actions only, that the present volume of this work relates. This volume relates only to personal.

Now personal actions are either *ex contractu* or *ex delicto*. Personal actions ex contractu or ex delicto.

That is, they are founded either upon the breach of some contract, express or implied, or upon the commission of some trespass, tort, or fraud.

Actions arising *ex contractu* are, for the most part, brought for the recovery, either of some debt or sum of money due, or of damages for the non-performance of some agreement or covenant.

Actions arising *ex delicto* are always brought for the recovery of damages proportionate to the injury sustained, by reason of the commission of some trespass, tort, or fraud.

We will now proceed to shew in what cases the defendant may be arrested, and held to bail in each of these personal actions, when it is,

(A) For a Debt or Sum of Money due.

(B) For Damages unliquidated.

(C) For a Penalty forfeited.

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(D) On

- (D) On a Judgment recovered.
- (E) On a penal Statute.
- (F) A second Action for the same Cause pending the first, or otherwise.
- (G) An Action removed from an inferior Court.

(A) (A) Where the Action is for a Debt, or Demand of Money due.

The criterion is the amount;

When an action is brought for the recovery of any debt, or money due, the *amount* of such debt, or demand, is the guide to shew whether such action be bailable, or not.

which must be 10l.,

And by the 12 G. 1. c. 29. the debt, or cause of action, must amount to *ten* pounds, to entitle the plaintiff to arrest the defendant, and hold him to special bail.

[This statute was explained and amended by 5 G. 2. c. 27.; extended to the court of Great Sessions in Wales by 6 G. 2. c. 14.; made perpetual by 21 G. 2. c. 3.; and extended to all inferior courts by 19 G. 3. c. 70.]

and more in some cases.

N. B. This is the general rule; but there are some exceptions, which are mentioned hereafter, where the debt must be a still greater sum, in order to hold the defendant to special bail. (For which see *post*, Sec. III.)

If 10l., bail of course.

Wherever, therefore, an action is brought for any debt, or money due, amounting to 10l. whether it be an action of debt, assumpsit, or covenant, special bail is of course.

But if the *cause of action* is 10l. it is sufficient:

But it is observable, that the above-mentioned statute does not merely say, that the *debt*, but the *cause of action*, must amount to 10l.; so that in some cases, where the *action* is not for the recovery of any actual debt, or sum of money, yet if the *cause of action* really amounts to 10l., defendant may be held to special bail.

as in trover.

Thus in *trover*, if the value of the goods converted by defendant amount to more than 10l., plaintiff may arrest him, and hold him to special bail, and this without any judge's order. *Catlin v. Catlin*, 1 Wil. 23. S. C. Stra. 1192. *Emerson v. Hawkins*, 1 Wil. 335. *Lumley v. Quarree*, Ray. 767. *Bangley v. Titcombe*, 6 Mod. 14.

But sometimes in trover, tho' for 10l. common bail only.

But the court, under particular circumstances, will sometimes discharge a defendant in an action of trover on common bail; as where it appeared that the defendant was a custom-house officer, and that there was a reason-

(A) Sec. I.] ACTIONS ARE BAILABLE.

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a reasonable ground for his seizing the goods, which were since deposited in the king's warehouse, and that he had used due diligence in proceeding toward a condemnation in the Exchequer; the Court, upon affidavit to this effect, ordered common bail to be accepted. *Barker v. Chalk*, 2 Blac. Rep. 1018. *Emerson v. Hawkins*, 1 Wil. 335. Say. 53. S. C. contra.

Moreover, by the same statute 12 G. 1. c. 29. it is not only necessary that the cause of action shall amount to 10l. but further, the plaintiff must *positively* swear that the cause of action is to that amount, in order to arrest defendant, and hold him to special bail.

There must be an oath of the amount,

Which affidavit must be framed agreeable to the nature of the case, with a certain degree of precision and formality. *Vide post*, chap. 4. sec. 1.

which must be positive.

In all cases, therefore, where the plaintiff cannot *positively* swear that the cause of action amounts to 10l. it is a sure criterion that special bail cannot, as a matter of course, be required.

And this oath, of the amount of the debt, must be without any evasion; so that, where there are mutual dealings and accounts between the parties, it is not sufficient for plaintiff to swear to the sum due upon one side only, without regarding the other side of the account. But the *balance* is the point in question, and should be the extent sworn to. *Bur. 1996. Dr. Turlington's case.*

Where mutual dealings, the balance must be sworn to.

(B) Where the Action is for Damages unliquidated.

(B)

In all actions, founded either *ex contractu* or *ex delicto*, where the object is the recovery of damages, either for the non-performance of any promise or covenant, or for misfeasance or negligence, or for the commission of any trespass or tort, such as actions on the case, covenant, trespass *vi & armis*, slander, and the like, which damages are *unliquidated*, and must be apportioned to the extent of the injury sustained at the discretion of a jury, the defendant cannot be arrested and held to bail; because plaintiff cannot *positively* swear that the cause of action amounts to 10l.; as it is not sufficient for the affidavit to be grounded merely upon his own conjecture, fancy, or caprice.

Actions on the case, trespass *vi & armis*, slander, &c.

only common bail, why.

But although plaintiff cannot, in such cases, arrest defendant, and hold him to special bail as a matter of

In some cases, a judge's order may be obtained to hold defend-

course,

ant to special
bail,

upon good cause
shewn.

To what
amount bail to
be taken.

Thus for scan.
mag.

For crim. con.

For mesne pro-
fits.

Gross assault,
or if defendant
is about to quit
the kingdom.
Formerly in ac-
tions on agree-
ments without
any penalty.

Plaintiff swore
to the damage
at his discretion.

But now other-
wise.

A general rule.

course, yet it is in the discretion of the court, or any judge, to make a rule or order, authorizing him so to do, if the *cause of action* be attended with aggravated circumstances, or it is apparent that the damages will exceed 10l. This, however, is only done where good cause is shewn, and upon an affidavit of facts. *Roberts v. Slingsby*, Sid. 307. Lev. 39. Brownl. 91. *Chetwin v. Venner*, Sid. 183.

In such cases, it is specified by the rule or order, at the discretion of the court or judge, the amount for which bail is to be taken.

Thus, on motion and order, plaintiff may have special bail for scan. mag. *Earl of Stamford v. Gordal*, T. Ray. 74. *Marquis of Dorchester's case*, 2 Mod. 215. *Chetwin v. Venner*, Sid. 183.

So by judge's order, in an action for crim. con. *Hadderweek v. Catmur*, Bar. 61.

So for mesne profits after a recovery in ejectment. *Hunt v. Hudson*, Bar. 85. In which case, if an order be made, the recognizance is usually taken in two years value, but that is discretionary.

So for any violent or cruel assault.

So also, in certain cases, where the defendant is about to quit the kingdom.

Formerly, indeed, where the action founded only in damages, and those damages were unliquidated, as in actions for the non-performance of any written agreement, where *no penalty*, or fixed sum, was agreed to be paid in case of such non-performance, if the plaintiff chose to swear positively that the damage sustained by him amounted to 10l. he might hold defendant to bail; nor would the court, on motion, interfere; for they held that the plaintiff, by the act of parliament, was the proper person to swear to his damages. *Cook and others v. Sankey*, Bar. 65. *Fleetwood v. Poitier*, Bar. 67.

But a different doctrine was afterwards holden in the case of *Reynoldson v. Blades*, Bar. 108. wherein the court said, that the above cases were not to be followed, and laid down this general rule:

Where damages can be reduced to a *certainly*, as in covenant for payment of money, or where a tenant covenants with his landlord to pay a certain sum for every acre of land he ploughs up, or the like, plaintiff is entitled to bail; otherwise not, especially without judge's order previous. For it is not reasonable, that defendant should be held to bail for such damages as plaintiff
fancies

fancies he has sustained, and is pleased to swear to. Bar. 108.

(C) Where the Action is founded on a Penalty.

(C)

The case of *Reynoldson and Blades*, above cited, seems only to apply where no penalty or forfeiture is mentioned in the agreement for the breach thereof; but where such penalty is inserted, the parties, by their own specific agreement, have ascertained the damage in case of non-performance, and defendant may be held to bail thereon.

Upon a written agreement.

Thus bail was allowed on an agreement in writing to deliver goods, or forfeit 100l., in an action for the penalty. *Kettleby v. Woodcock*, Bar. 86.

So in *covenant*, where there is a penalty for the non-performance of any agreement.

On a covenant.

But, in all such cases, bail should only be taken for a sum proportionate to the *damage* sustained, by reason of the breach of the agreement or condition; the measure of which damage is to be ascertained by plaintiff's oath.

To what amount bail should be taken in such cases;

The Court, however, will not interfere on motion, should the plaintiff hold defendant to bail for the whole of the penalty, though the real debt, or damage, be under 10l.

and how far the Court will interfere.

But in the case of *Kirk v. Strickland*, Do. 449. where the penalty was 50l., and the real debt only 3l., and defendant was held to bail for the penalty; on motion for him to be discharged on common bail, the Court said, the conduct of plaintiff was altogether unjustifiable, and that he was liable to an action. That in the case of a bond, for the performance of a promise of marriage, and in some other instances, the penalty is the real debt; but in other cases, the bail could only be taken for the sum to which the plaintiff would be entitled in damages for the breach of the condition; and although it had been their uniform practice not to go into the merits upon such a motion, but to take the matter as it stood upon the affidavit to hold to bail, yet they granted the rule, declaring that they were persuaded plaintiff would not venture to shew cause against it.

In one case they did interfere.

Although in a later case, of *Willes v. Dent*, Hil. 23 G. 3. where defendant was arrested on an affidavit, that he was indebted to plaintiff in 1000l. under and by *virtue* of a certain covenant contained in an agreement, Baldwin moved, that the defendant might be discharged

but have since refused.

on filing common bail, and cited Kirk and Strickland as in point. But per Ld. Mansfield, and the Court, motion was denied, and no rule *nisi* granted.

Rule as now settled.

Breach must be stated.

It now seems to be settled, that where the parties have agreed upon any specific penalty to be forfeited on the breach of any agreement, such penalty is to be deemed the debt for which the defendant may be held to bail; but it is necessary for the plaintiff in his affidavit to hold to bail to shew some breach of the agreement whereby such penalty became forfeited, otherwise defendant, upon motion, will be discharged on common bail. *Stenson v. Hughes*, K. B. Mich. Term, 1794. *Archer v. Ellard*. Say. 109.

On bonds for the performance of covenants.

In actions on bonds, to save harmless and indemnified, or for the performance of covenants, bail should not be taken on the penalty, but plaintiff should swear how, and for how much he is damaged, and assign the breaches of the covenants in his affidavit. *Whitfield v. Whitfield*, Bar. 109. *Executors of Boothby v. Buller*, Sid. 63. *Anon.*, Salk. 100.

To what amount bail should be.

So in debt upon a bond conditioned for the indemnification of a parish against a bastard child, the defendant ought not to be held to bail for the penalty, but only for the amount of the damage incurred; and if that be under 10*l.* cannot be held to bail at all. *Archer v. Ellard*, Say. 109.

General rule as to actions on bonds.

In strictness of law, the penalty in a bond is the debt due; but, by the equitable construction of the 4 Ann. c. 16, bonds with penalties are merely deemed securities for the payment of the principal, interest, and costs. The general rule, therefore, with respect to holding to bail in actions on bonds, is this: If they be for payment of money, defendant may hold to bail to the amount of the *real sum due*; if they be bonds of indemnity, or for performance of covenants, then to the amount of the *real damage* sustained by the breach; but if the *penalty* be the *real debt*, and in nature of stated damages, as in bonds for the performance of marriage, then to the full amount of the penalty.

(D)

(D) Where the Action is founded on a Judgment recovered.

There are five cases in which such actions are usually brought.

Actions on judgments may be brought,
1st, Where the original cause of action was bailable, and defendant was arrested, and held to bail thereon.

2d,

(D) Sec. II.] ACTIONS ARE BAILABLE.

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2d, Where the original cause of action was for a debt or demand under 10l. and therefore not bailable, but the judgment, with the costs, amount to above that sum.

3d, Where the original cause of action was for unliquidated damages, as in trespass, &c. and therefore not bailable; but judgment is above 10l.

4th, Where the plaintiff was non-prossed, or non-suited, in the original action, and the defendant, in such action, brings *his* action on the judgment of nonsuit, or nonpros.

5th, Where the action on the judgment is brought, pending a writ of error on such judgment.

In the first case, it seems to have been, and still is the uniform practice of both courts, that a defendant is not to be *arrested* twice for the same sum; if, therefore, he was arrested in the *original* action, he is not to be held to bail in an action on the judgment. *Collins v. Powell*, B. R. 2 D. & E. 757. *Kendal v. Carey*, C. B. 2 Blac. 768.

The practice of the courts in the first case the same.

Defendant not to be held to bail, why.

And this, although the bail in the original action have absconded or become insolvent. *Beaven v. Barnet*, Say. Rep. 160.

Or the defendant has *surrendered* in their discharge, and obtained a *supersedeas*. *Hall v. Howes*, 2 Str. 1039. Caf. Pr. C. B. 34.

In both courts, defendant may be held to bail in the action on the judgment, provided the original cause of action was *bailable*; but plaintiff did *not arrest*, and hold defendant to special bail thereon.

But in C. B. it has been determined, that although plaintiff did arrest defendant in the original action; yet if he afterwards declared against him in a different cause of action from that mentioned in the writ, and thereby defendant obtained his discharge on filing common bail, that he might hold him again to bail in an action on the judgment, because the plaintiff having lost his bail in the original action, was in the same situation as if he had not holden the defendant to bail at all. *De la Cour v. Read*, 2 H. Blac. 278. But this seems contrary to the principle laid down in other cases, that defendant shall not take advantage of his own laches. *Crutchfield v. Seyward*, 2 Wil. 93. *Blandford v. Foote*, Cowp. 72.

In the second, third, and fourth cases, the courts for a long time differed in their practice: in the King's

In the 2d, 3d, and 4th cases, practice formerly different.

Bench special bail was *not* allowed; in the Common Pleas it was. See *Belither v. Gibbs*, Bur. 2117. *Game v. Walkin*, Str. 975. *Robinson v. Nicholls*, Str. 1077. *Palmer v. Needham*, Bur. 1389. *Anon. Cowp.* 128. *Cressy v. Kell*, 1 Wil. 120. *Busb v. Bates*, Bur. 2660. *Nightingale v. Nightingale*, Blac. 1274.

Principle of
such difference.

The principle of the decisions in the Court of King's Bench seems to have been, that the action of debt on the judgment follows the nature of the original action; and that the intention of the act of 12 G. 1. c. 29. was, that special bail should only be required where the original debt or cause of action amounts to 10l.; whereas the rule in the Common Pleas was, that let the original cause of action be what it might, provided the judgment be above 10l. and provided *no bail has before been given* in the action in that court, plaintiff might arrest defendant on the judgment. The practice of the Court of Common Pleas certainly appears to have been the most reasonable; and it is not a little singular that such a difference of opinion between the then judges of the two courts should have so long subsisted, especially as in some of the above cases it was particularly noticed and animadverted upon.

Now settled
and made uni-
form.

Nor was it settled till Hil. Term, 32 G. 3. when Lord Kenyon said, that as a different practice had prevailed in the different courts, it was proper that a conference should be had with the judges of the Common Pleas in order to make the practice in future uniform; and accordingly that such conference was had, and that the judges of the King's Bench had agreed to conform to the practice of the other court. *Lewis v. Pottle*, 4 D. & E. 570. So that now, in the above cases, defendant may be held to special bail in both courts.

In both courts
defendant may
be held to bail.

As to the fifth
case, courts of
C. B. and B. R.
formerly dif-
fered,

As to the fifth case above-mentioned, viz. where the action on the judgment is brought, pending a writ of error on such judgment, the court of C. B. always allowed defendant to be held to bail, if there had been no bail in the original action, notwithstanding such writ of error was brought, and bail thereon in the court of King's Bench. *Kendal v. Carey*, Blac. 768. *Weyman v. Weyman*, Bar. 71; and this, although defendant had been arrested in the original action, but plaintiff had waived his bail by declaring differently from process. *De la Cour v. Read*, 2 H. Blac. 278; but see *Crutchfield v. Seyward*, 2 Wil. 93.

but now seem
to agree in their
practice.

So in K. B. by a note with which I have been favoured, Buller J. said, in Trin. Term, 25 G. 3. that plain-
tiff,

(D) Sec. I.] ACTIONS ARE BAILABLE.

tiff, in the original action, may hold defendant to bail in an action of debt upon the judgment in such original action, notwithstanding error brought, provided no bail was given in the original action. Defendant may be held to bail.

In an action on a recovery, in a foreign court, there shall be only common bail. *De Balf v. Mackenzie*, Str. 1243. S. C. Bar. 73. What bail on judgment in foreign courts.

In an action on a judgment of an inferior court, though bail was given in the original action below, defendant may be held to special bail, because no bail has been given in the superior court before. *Davis*, executor, *v. Leckie*, Bar. 94. On judgment in inferior courts.

But it may be generally observed, that although in actions of debt on judgment, special bail may, in certain cases, as above mentioned, be required; yet it can only be had once; for if plaintiff in such case recovers, he cannot arrest defendant in another action upon such second judgment. *Chambers v. Robinson*, Str. 782. Special bail only once in actions on judgment.

In debt on a judgment, after defendant has been superfeded, if owing to plaintiff's laches, common bail only is requisite in both courts. *Hall v. Howes*, Str. 1039. *Blandford and others v. Foot*, Cowp. 72. *Chambers v. Robinson*, Str. 782.; but see a seeming contrary principle laid down in *De la Cour v. Read*, 2 H. Blac. 278. How if defendant was superfeded,

But if the superfedas be gained by surprise, special bail. *Whalley v. Martin*, Bar. 62.

The defendant cannot, after being superfeded, be held to special bail in an action brought upon such former judgment; yet he may be charged in execution after judgment obtained in the second action. *Poulter v. Salmon*, Bar. 383.

Where the defendant might have pleaded bankruptcy in the first action, but did not, he shall still be held to special bail upon the judgment, because the court will look no further than the judgment. *Combes v. Blackhall*, Str. 477. or become bankrupt.

(E) Where the Action is on a penal Statute.

(E)

In actions on penal statutes, the defendant, generally speaking, is not to be arrested and held to special bail, because the penalty is in the nature of a fine or amercement, set on the party for an offence committed; and, therefore, no persons ought to suffer any inconvenience, by reason of such law, till he is convicted of the offence. No bail,

St.

St. George's case, Yelv. 53. 2 Brown, 293. *Presgrave's case*, Comyns, 75. Barnes, 80. *Whittingham v. Cogblan*.

So in *qui tam* actions.

Except autho-
rised by the
statute;

But there are some exceptions to this rule; as where the statute on which the action is brought expressly authorises an arrest, as the 11 & 12 W. 3. for exporting wool; 26 G. 2. c. 21. for having unsealed wrought silk in defendant's custody. *Rex v. Rebord*, Bur. 1569.

So in actions on the lottery act, 27 G. 3. c. 1. *Davis v. Mazzinghi*, 1 D. and E. 705. *Holland v. Bothman*, 4 D. & E. 228.

or the action be
on a remedial
statute.

So if the action be on a remedial statute, as on statute 9 Ann. c. 14. by the loser against the winner at play; because it is at the suit of the party grieved, wherein defendant is debtor to the plaintiff in so much money had and received. *Turner v. Warren*, Str. 1079; or on the 4 G. 2. c. 28. for double rent.

(F)

(F) Where it is a second Action for the same Cause, pending the first, or otherwise.

It is a maxim in law, *nemo debet bis vexari pro eadem causa*.

Upon this principle was the rule of court, Mic. Term, 15 Car. 2. that if a defendant be lawfully delivered from an arrest upon any process, the same defendant should not be again arrested at the same time by virtue of any process at the suit of the same plaintiff, otherwise both attorney and plaintiff to be punished.

Formerly no
bail in a second
action, after a
nonpros or
nonsuit.

So strictly was this formerly attended to, that even if a plaintiff were nonpros or nonsuited, though perhaps for a mere defect in the pleadings, and afterwards brought a second action, defendant could not in such second action be arrested. *Almanzor v. Davila*, Com. 94. S. C. Ray. 679.

But now other-
wise.

But the practice is now otherwise: and plaintiff may, after a nonpros or nonsuit, bring a second action, and hold defendant to special bail, it being deemed a sufficient punishment to plaintiff to pay costs in the first action. *Turton v. Hayes*, B. R. Str. 439. *Harris v. Roberts*, C. B. Bar. 73.

Difference be-
tween nonsuit
on the merits or
not.

In B. R. however, a distinction hath been made between a nonsuit upon the merits, and upon a slip or informality; in the latter case defendant may be held to bail in a second action, but not in the former.

There are also other exceptions to this rule.

As if plaintiff, by a mere mistake of his attorney, hath misconceived his form of action, he may *discontinue* upon payment of costs, and arrest defendant in a second action for the same cause. *Bates v. Barry*, 2 Wil. 381; or if from defect in the affidavit, defendant be discharged on common bail.

But he should be always careful to *discontinue* regularly the first action, and to get the costs *taxed and paid*, before he commences the second action; otherwise the defendant, upon motion, will obtain his discharge from such second arrest, upon filing common bail; for it is a general rule, that no one ought to be arrested in a second action, whilst another action for the same cause, and in which he had been before arrested, is depending. *Belifante v. Levy*, Str. 1209.

The case of *Olmus v. Delaney* was, indeed, an exception to this rule: it was an action of debt on bond for pool; defendant put in bail, who justified, and were allowed; plaintiff afterwards, finding that they were forsworn and worth nothing, discontinued, having *first* arrested the defendant in a second action, and held him to bail; upon which defendant moved to be discharged on common bail, according to the above general rule; but on shewing cause, a scene of villany appearing to the court, they discharged the rule, and said that plaintiff was right in laying hold of him as he did; for had he discontinued before, the defendant probably would have absconded, and therefore ordered him to be held to special bail. Str. 1216.

There should be strong circumstances of fraud and villany, on the part of defendant, to justify plaintiff in such a step; for, unless the necessity of it clearly appeared, no court would countenance the proceedings.

We accordingly find, in the case of *Belcher and Gansell*, Bur. 2502, which was also an attempt by plaintiff to get rid of bail who had justified, but were afterwards found to be worth nothing, that the attorney was reprimanded by the court for his conduct, the side-bar rule for discontinuing the former action was discharged, and the original bail still remained liable to their recognizance; and yet in this case the first action was actually discontinued before the commencement of the second; but such discontinuance not being until after bail had justified, and the Court, conceiving the whole to be a trick to oppress defendant, shewed their disapprobation of it, notwithstanding the case of *Olmus* and *Delaney*, and

Of arresting defendant in a second action, after discontinuance of the first.

Such discontinuance must be regular.

Under strong circumstances of villany, arrests in second actions have been allowed before discontinuance;

but the circumstances must be strong.

or the court will discountenance such proceeding.

said,

said, that the attorney ought first to have applied to them *disclosing* all the circumstances.

Plaintiff may arrest defendant without discontinuing if not held to bail in first action,

It is observable that the above cases only apply to a *second arrest* for the same cause; for if the defendant has before been only served with process, plaintiff may afterwards sue out bailable process, and arrest defendant *before* he has discontinued the first action, which may be discontinued at any time. *Bishop v. Powell*, 6 D. and E. 616.

or if discharged without plaintiff's fault.

Another exception to the above maxim is, when defendant was discharged from the first arrest for some act over which the plaintiff had no control, and for which he was not answerable, as a defect in the warrant, or the like. *Housin v. Barrow*, 6 D. & E. 218.

If cause referred, defendant may be arrested on the award, though bail in original suit.

So if out of the old action any new cause of action arises, it does not fall within the rule; as where a cause, in which defendant was held to bail, is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10*l*. the defendant may be arrested again in an action upon the award; for the reference put an end to the first action, and a new cause of action arose by the arbitration. *Collins v. Powell*, 2 D. and E. 756.

So when defendant deceived plaintiff by giving him a draft for the debt, and promising immediate payment, which was discharged, and plaintiff arrested him again on the old affidavit, held good. *Puckford v. Maxwell*, 6 D. & E. 52.

(G)

(G) Where the Action is removed from inferior Courts,

Former practice.

Various cases are to be found in the books respecting the practice of holding to bail where the cause was removed out of an inferior court; and the general rule seems to have been, that in all cases, excepting that of an executor, where the cause was removed by *habeas corpus*, the defendant was obliged to find special bail, although the original cause of action would not have been bailable in the superior court; because otherwise, the defendant had it in his power to put the plaintiff in a worse condition than he was in before, and this they did out of indulgence to inferior courts. *Page v. Price*, Salk. 98. 102.

Now settled by Statute.

But now the practice in this particular is clearly settled by the 19 G. 3. c. 70.; which, in the first place, by sec. 1. has abolished all distinction between *inferior* and *superior* courts, as to the sum for which a person may be arrested;

arrested, which must now be tol. in both courts; and secondly, by sec. 6. has positively enacted, that defendants must find bail upon removal of the cause, though not originally of a bailable nature.

Having considered the nature of the cause of action, and its object, the next thing to be attended to, in order to discover whether the action is bailable or not is, the person against whom such action is to be brought; for it often happens, that a defendant by reason of the character in which he is sued, or his peculiar station in life, or some other circumstance, is either wholly or partially protected from arrests; it is necessary therefore to consider to what persons such privileges and exemptions extend.

SECTION II.

The Person against whom the Action is to be brought; and herein,

- (A) Of Defendants sued in *auter Droit*, as Executors, Administrators, Assignees, &c.
- (B) Of Persons wholly *privileged* from Arrests.
- (C) Of Persons *protected* only in certain Cases, or to a certain Amount.

(A) Of Defendants sued in *auter Droit*.

(A)

A defendant is said to be sued in *auter droit* when an action is brought against him as the representative of another, for a debt, or cause of action, contracted or incurred, not by the defendant himself, but by the person whom he so represents. What is meant thereby.

In which case, although he may be liable to an action, and answerable to the extent of the property of the principal which he may have in his hands, yet it would be contrary to reason and justice if his person were subject to an arrest and imprisonment.

Heirs, executors, and administrators, therefore, when charged *as such*, cannot be arrested and held to bail; because the demand is not on the person, but on the assets of the deceased. 2 Brown, 293. *Smale v. Warm*, 3 Bull.

Heirs, executors, administrators, exempt,

316.

If

unless they
make them-
selves answer-
able

If however, they commit any act, to make themselves and their own property legally answerable for such demand, then they may be arrested and held to special bail; because the action, in such case, attaches upon them, and they are not sued in *auter droit*, but in their *own* right.

by promise,

Thus, if an heir, executor, or administrator, personally promises and undertakes, in writing, to pay any debt or legacy, such promise will be binding, and he himself rendered liable to be arrested for payment of such demand. *Mackenzie v. Mackenzie*, 1 D. & E. 716.

by a devastavit,

So if an executor, or administrator, has been guilty of a *devastavit*, or wasting the deceased's goods; in an action suggesting such *devastavit*, he may be arrested; because, by such misconduct, he has rendered himself and his own property liable. *Page v. Price*, Salk. 98. *Horsey v. Daniel*, 2 Lev. 145. Sid. 63. Executors of *Boothby v. Buller*.

But then it should be, an actual *devastavit*, returned by the sheriff, or at least grounded on an affidavit. *Duprett v. Testard*, Carth. 264. A mere suggestion of a *devastavit* is not sufficient. 1b.

bail, or sureties,

Upon a similar principle, in actions against bail, defendants are not to be arrested, since they are sued, not for a debt contracted by themselves, but by their principal for whom they are bound; and besides, were it otherwise, it would lead to bail *ad infinitum*. *Brander v. Robson*, 6 D. & E. 336.

In actions, therefore, on bail-bonds, replevin-bonds, and the like, common bail only is required. *Dux Ormond v. Brierly*, Salk. 99.

assignees of
bankrupt.

So assignees of bankrupts, being merely the representatives of another, are not to be arrested.

(B)

(B) Of Persons *privileged* from Arrests.

In what cases
generally.

There are certain persons who, though sued in *their own right*, are by law *privileged* from arrest; and this either

(B. 1) By reason of the Defendant's legal Incapacity.

(B. 2) By reason of the Dignity of Defendant's Station.

(B. 3) By reason of the peculiar Nature of Defendant's Profession or Office.

(B. 1) Of

(B. 1) Of Defendants who, by reason of legal Incapacity, are privileged from Arrests.

(B. 1)

On account of the legal incapacity of minors to make any contract, no one ought to be arrested for any debt incurred during his infancy, except it be for *necessaries* suitable to his situation in life, or he has promised to pay since he became of age.

Minors.

So a feme covert cannot be arrested, nor can any action be brought against her without making the husband a party to the suit.

Feme covert,

In which actions the husband alone ought to be arrested, who is to put in bail for himself and wife. *Roberts v. Andrews & Ux.* Blac. 720. *Edwards v. Rourke & Ux.* 1 D. & E. 486.

not to be arrested.

Nor can the wife be arrested, although the husband cannot be found, if it be notorious that she is a married woman. lb.

For this privilege, or protection, is founded not only upon the principle of the legal incapacity of a feme covert to do any act for herself; but also because, as she has for the most part no property of her own, she might, if liable to an arrest, be imprisoned for life.

Why.

But there are some exceptions to this rule; so that in certain particular cases, a feme covert may be arrested.

Exceptions to the rule,

As if the coverture be not open and notorious.

and in what cases she may be arrested.

Or defendant has imposed upon plaintiff in passing for an unmarried woman. *Pearson v. Meaden*, Blac. 903. *Wilson v. Campbell*, M. 20 G. 3. *Partridge v. Clarke*, 5 D. & E. 194.

Or if she live notoriously in a state of separation, and the like. *Corbet v. Poelnitz & Ux.* 1 D. & E. 5.

In which cases, the action may be brought against her only.

How action to be then brought.

With respect to taking a feme covert in execution, the law is somewhat different; but it is sufficient, in this place, to have shewn how far she is liable to be arrested on *mesne* process. Any further proceedings by or against baron and feme must be reserved to another part of the work.

(B. 2) Of

(B. 2) Of Defendants who, by reason of the Dignity of their Station, are privileged from Arrests.

1.
Royal family
and servants.

1st, The royal family, as the highest in dignity, are the first entitled to this privilege. It is extended also to the king's servants in ordinary, and menial servants. *The King v. Moulton*, &c. 2 Keb. 3. *The King v. Thrampton*, ib. 485. *Dixon v. Killigrew*, T. Ray. 152.

The junior clerk of the kitchen to the king at St. James's was discharged out of custody, upon motion, when taken in execution after judgment by default. *Bartlett v. Kebbes*, 5 D. & E. 686.

To what servants.

But this privilege only extends to the servants of the king and queen *regent*, and not to those of the queen *consort* or queen *dowager*. *Starkie's case*, 1 Keb. 842. *The King and Capell v. Bauld and Segrave*, ib. 877.

2.
Ambassadors,
ministers, and
their domestic
servants.

2d, Ambassadors, public ministers, of any foreign prince or state (authorised and received as such by his majesty), and their domestic servants, are privileged from arrests.

7 Ann. c. 12.

This is declared to be the law by the 7 Ann. c. 12; but this act was only a *declaratory* act; for the privilege itself is founded upon the *law of nations*, and always existed. The only thing new in that act, is a clause, s. 4. which gives a summary jurisdiction for the punishment of the infractors of this law. Bur. 1480:—

S. 4. Punishment of offenders against that act.

“Whereby the party suing and the attorney prosecuting such suit, and the officers executing the process; being convicted by the oath of one witness before the Lord Chancellor, the C. J. of B. R. or C. J. of C. B., or any two of them, shall suffer such pains, penalties, and punishment, as they, or any two of them, shall impose.”

Occasion of that act.

The above act of parliament was occasioned by a particular circumstance, namely, the arresting of an ambassador from Peter the Great Czar of Muscovy, who, highly resenting the affront, this act was passed, and sent to him as a national apology. See an account thereof, 1 Blac. Com. 255.

Proviso with an exception to merchants and traders.

By s. 5. of the above act, there is a proviso, “that no merchant, or other trader whatsoever, within the description of any of the statutes against bankrupts, who puts himself into the service of any such ambassador, or public minister, shall have the benefit of that act.”

And

And further, "that no person shall be proceeded against as having arrested the servant of any ambassador, or public minister, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriffs of London and Middlesex for the time being, or their under-sheriffs, or deputies, who shall, upon the receipt thereof, hang up the same in some public place in their offices, whereto all persons may resort, and take copies thereof, without fee or reward."

Necessity of registering the ambassadors servants names, and where.

Since the passing of the act of 7 Ann. various cases have been decided concerning this privilege, from which it may be collected, 1st, with respect to the *ministers* themselves who are privileged:

The stat. Ann. explained.

That they must be ambassadors, or public ministers, authorised, and received here as such.

With respect to the ambassadors themselves to be protected.

Consuls, or agents of commerce, though received as such by the courts to which they are employed, are not such ministers as are protected or privileged.

2d, With respect to the *servants* of such ambassadors:

With respect to their servants. Must be domestic.

Such servants must be, *bonâ fide, domestic servants*. *Poitier v. Croza*, Blac. 48.

Not that it is necessary for them to lie in the house, (though that was formerly thought essential, 1 Wil. 79.) as many houses are not large enough to lodge all the servants of ambassadors; but they ought to be actual servants, employed in or about the house. *Toms v. Hammond*, Bar. 370.

There must be a *retainer*, an *office by name*, and an *actual service*, in that office. *Triquet v. Bath*, Blac. 474.

Essentials to make them so.

The nature of the service, and the actual performance of it, must be particularly sworn to. Bur. 1479. *Peach and others v. Bath*. But it is not expected that every particular act of the service should be specified. *Ib.*

Which must be sworn to.

The affidavit, therefore, to discharge such servant, if arrested, should specify his employment; for swearing generally that he is a domestic, or menial servant, is not sufficient; nor, on the other hand, is it enough to shew that he is a servant of an ambassador, and to specify the nature of that service, unless it further appears, that he is also, generally speaking, a *domestic servant*. *Poitier v. Croza*, 1 Blac. 48. *Seacomb v. Bowlney*, 1 Wil. 20. *Carolino's case*, 1 Wil. 78. *Lockwood v. Coysgarne*, Bur. 1676.

What the affidavit must contain.

But the *secretary* of a foreign minister, though not immediately a domestic, is a servant within the statute. *Hopkins v. De Robeck*, 3 D. and E. 79.

The affidavit must also shew, that he was such domestic servant at the *time* of the arrest; for it will be no protection to make him so afterwards. *Heathfield v. Chilton*, Bur. 2017.

It should, lastly, shew that he is not a trader, or subject to the bankrupt laws.

Privilege extends to the foreign servants of ministers.

N. B. This privilege from arrest extends as well to the servants who are natives of the country where the minister resides, as to his foreign servants whom he brings over with him. Bur. 1677.

The courts require the above particularities, in order to prevent any unjustifiable abuses of this privilege, which might otherwise be perverted into a mere scheme to screen people from their creditors.

For although the process of the law shall not take a domestic servant out of the service of a public minister, yet a public minister shall not take a man from the custody of the law. Bur. 2017.

With respect to the exception in the statute as to traders.

3d, With respect to the proviso in that act, in s. 5, as to the exception to traders or merchants, it was held, that an English secretary to a foreign minister, who was formerly a trader, but who hath some years back left off trading, does not come within the exception, though he may even be under suspicious circumstances. *Triquet, and others, v. Barb*, Bur. 1478.

For if such service, as is here spoken of, be sufficiently proved by affidavit, the court will not, upon bare suspicion only, suppose it to have been merely colourable and collusive. *Id.*

With respect to the registering of the names of such servants.

4th, With respect to the other part of the proviso, namely, the *registering* of the names of such ambassadors servants, it is to be observed, that this is no condition precedent to the being entitled to the privilege of a public minister's servant. It only relates to the officer who arrested him, and who, in case of the neglect of such entry, is not liable to be punished under that statute, although the person arrested may still, on application to the court, be discharged. Bur. 2017. *Hopkins v. De Robeck*, 3 D. & E. 79. *Seacombe v. Bowlney*, 1 Wil. 20.

3. Peers and peeresses.

3. The next persons to be mentioned as privileged from arrest, on account of the dignity of their station, are,

are, peers of the realm of *England*, and peeresses, as well by birth as by marriage.

The like privilege is given by the act of union, 5 Ann. c. 8. art. 23, to peers and peeresses of *Scotland*.

And even if defendant succeeds to a peerage after he is arrested in an action, he will on motion be discharged. *Trinder v. Shirley*, Do. 45.

But by peers of the realm of *England*, is to be understood lords of the parliament of *England*: so that all other noblemen, not being lords of the parliament of this realm, are not privileged. This privilege, therefore, does not extend to Irish or other foreign peers. 2 Inst. 48. 3 Inst. 30.

What to be deemed such.

Nor to peeresses who became such by marriage, and afterwards have married commoners: but it is otherwise, if they were peeresses by descent: "For if a woman that is noble by descent, marry one that is under the degree of nobility, she remaineth noble still; but if she gain it by marriage, she loses it if she afterwards marry under the degree of nobility." Co. Lit. 16. b.

Not to peeresses by marriage, who afterwards marry commoners;

Nor to the son and heir apparent of a peer; but an infant peer is privileged, his person being held sacred. Co. Lit. 156. 2 Inst. 48.

nor to the son of a peer;

Formerly the servants of peers, who were necessarily and properly employed about their estates and persons, were privileged from arrest. *Chester v. Upsdale*, 1 Wil. 278.

nor to their servants.

But by the 10 G. 3. c. 50. s. 10. this privilege, together with all others which derogated from the common law in matters of civil right, save only as to the freedom of the members persons, was abolished. 1 Blac. Com. 165.

4. By the privilege of parliament, as also by the statute 10 G. 3. c. 50, members of parliament cannot be arrested.

Members of parliament.

This, however, is a limited protection; namely, for forty days after every prorogation, and forty days before the next appointed meeting; which is now in effect as long as the parliament subsists, it seldom being prorogued for more than four-score days at a time. 1 Blac. Com. 165.

To what extent.

This privilege of parliament holds in the case of informations for the king, except it be for treason, felony, or the like; that is, where surety for the peace is required, to which cases it is not extended. *The King v. Wilkes*, 2 Wil. 159.

In what cases.

To what extent bishops, members of convocation, and their servants, are entitled to this privilege. See stat. 8 Hen. 6. c. 1.

(B. 3) (B. 3) Of Persons privileged by reason of the peculiar Nature of their Profession or Office.

Attornies and officers of the courts.

Persons privileged from arrests, by reason of the nature of their profession or office, are, *attornies and other officers of the courts*, whose constant attendance in the courts is presumed to be necessary.

If therefore such person be arrested, he is entitled to his discharge; for the mode of obtaining which, see vol. 2. *Of Proceedings by and against Attornies.*

(C) (C) Of Persons *protected* only in certain Cases, or to a certain Amount.

The persons who have hitherto been spoken of, are such as are *wholly* privileged from arrests; but there are some who are only *partially* protected in certain cases, and to a certain amount; such are,

Soldiers and sailors.

Soldiers and sailors in his majesty's service, who have either been enlisted therein against their will, or have voluntarily enlisted themselves.

Inlisted soldiers not to be arrested.

By the acts for recruiting his majesty's land forces and marines, it is enacted, that no person enlisted shall be taken out of his majesty's service by any process, other than for some criminal matter; but it was held in a case on one of these acts, viz. 30 G. 2. c. 8. that it only meant to privilege such persons from arrests as were under that act *compelled* against their wills to serve as soldiers, and not to a person who *voluntarily* enlisted himself. *Turner v. Turner*, Bur. 466.

If arrested, may be surrendered.

Where defendant, an enlisted person, has been arrested and held to bail, he may be surrendered by his bail in their own discharge; for the manner of doing which, *vide* the case of *Bond v. Isaac*, Bur. 339.

Volunteer seamen not to be arrested under 20l.

By 1 G. 2. st. 2. c. 14. and 31 G. 2. c. 10. for encouraging seamen to enter, "No person who shall list himself to serve on board any of his majesty's ships of war shall be held to bail, but on affidavit, that the sum "justly due amounts to 20l."

Who are deemed within this statute.

A seaman, upon the ship's books, though he has absented himself, is a seaman within the act. *Studwell v. Bunton*, Bar. 95.

Armourers,

Armourers, gunners, &c. inlisted as common seamen, are within it. *Barnsley v. Archer*, Bar. 114.

By the mutiny act (31 G. 3. c. 13. s. 65.), in order to prevent so far as may be any unjust or fraudulent arrests that may be made upon soldiers, whereby his majesty and the public may be deprived of their service, it is enacted, that no person who is listed, or shall list himself, as a volunteer, shall be taken out of his majesty's service by any process or execution, other than for some criminal matter, unless the original sum, or cause of action, amounts to 20l. over and above all costs, and a memorandum thereof marked on the back of the process.

Volunteer soldiers not to be arrested under 20l.

Not only common soldiers, but non-commissioned officers and privates, have been held within the statute. So are serjeants; and the certificate of the *secretary* at war of the nature of a serjeant's station, may be read as evidence. *Lloyd v. Wooddall*, 1 Blac. 29.

Who comes within this act.

So is a drummer and a gunner in the train of artillery. *Johnson v. Louth*, Str. 7. A trooper just inlisted. *Bayley v. Jenners*, Str. 2. Recruits just inlisted. But an out-pensioner of Chelsea Hospital is not. *Bowler v. Owen*, Bar. 432.

A militia-man, under the supplementary militia act, 37 Geo. 3. is not protected until embodied, and called into service, Easter Term 1797.

And in all the above cases this exception only relates to civil actions, not to any thing of a criminal nature; so that a soldier is liable to be taken up for disobeying any order of a justice, inasmuch as that is an offence so far criminal, that in almost every instance the party may be indicted for it. *The King v. Archer*, 2 D. and E. 273.

It only extends to civil cases, not to criminal.

If a person privileged within these statutes be arrested and pays the debt, in order to obtain his liberty, the court, on motion, will compel the party arresting him to repay him such money; it having been held equally reasonable, that the money paid by defendant to obtain his liberty should be repaid, as that his person, in case the application had been on that account, should have been discharged. *Methuen v. Martin*, Say. 107.

Money to be retuned, if paid for his discharge.

So persons living in Wales, and the counties palatine, are protected from arrests to a certain degree; for, by the statute 11 & 12 W. 3. c. 9. "sheriffs, &c. are not to take special bail in *Wales* or *counties palatine*, upon process out of his majesty's courts at Westminster, unless affidavit be first made, and filed in court, that the cause of

No arrest in Wales or counties palatine, unless cause of action amounts to 20l.

action amounts to 20l. or upwards; and bail not to be taken for more than the sum expressed in the affidavit."

Special bail was taken for 12l. upon process into Lancashire; and on motion for common bail, plaintiff insisted, that as the 12 G. 1. c. 29. about not holding to bail under 10l. had an exception to Scotland only, it was intended to extend to all other places, and consequently was a virtual repeal of 11 & 12 W. 3. But per cur. they are not inconsistent; for the 12 G. does not say, you shall have bail for 10l. but only that you shall not have bail under 10l.; whereas, in 11 & 12 W. 3. there are negative words; and the oath, in this case, being only to 12l. plaintiff is not entitled to hold defendant to special bail. *Smith v. Dudley*, Str. 1102. *Ld. Molineux v. Charles*, Bar. 69. *Rayner v. Brough*, Bar. 89.; where it is also said, that the statute of W. is not repealed by the 12 G. 1.

SECTION III.

Of particular Circumstances in the Case, which exempt Persons from being held to special Bail, who would otherwise be liable thereto.

THE action may, in its nature and object, be a bailable one, and the party against whom it is brought may not come within any of the descriptions above mentioned, so as to entitle him to privilege or protection; and yet, from some peculiar circumstances, defendant may be exempt from special bail.

Certificated
bankrupts dis-
charged from
debts before
bankruptcy;

Such is the case of certificated bankrupts, with respect to all causes of action which accrued previous to the commission of bankruptcy, and which could have been proved under it; for which they are not only not liable to be arrested, but the debt, or demand itself, is discharged by the certificate; and this, though judgment is not obtained till after the certificate allowed. *Cooke's Bankrupt Laws*, 343.

and interests
and costs at-
taching thereto;

And not only the original debt itself is discharged, but the whole that relates thereto; as any interest that may have accrued thereon, or any costs that may have been incurred, in the suing of such debt since the bankruptcy; as they all stand upon the same footing. *Blandford v. Foote*, Cowp. 138. *Graham v. Benton*, 2 Str. 1196.

But

But if the bankrupt pleads a false plea in an action against him as executor, between the time of the commission and of his obtaining his certificate, whereby he has had judgment against him as to the costs of such plea de bonis propriis, he shall not, after he has obtained his certificate, be discharged from such costs. *Howard v. Jemmot*, Bur. 1368.

but not so, if he pleads a false plea as executor.

It is, however, to be observed, that this exemption only holds good where the *cause of action* was previous to the bankruptcy, and the debt itself could be proved under the commission; for otherwise they are liable to an arrest. *Hockley v. Merry*, Str. 1043. *Tully v. Sparks*, Str. 867. *Cockerill v. Ouston*, Bur. 436. and a variety of other cases; for which see Cooke's Bankrupt Laws, 345.

Nor is a bankrupt free from arrest, except where the debt could be proved under the commission.

And even if a bankrupt, after having obtained his certificate, promises a creditor, who did not prove his debt under the commission, to pay him, and is afterwards arrested on that promise, the court will discharge him on common bail. *Bayley v. Dillon*, Bur. 736.

Bankrupt cannot be arrested on a subsequent promise.

And upon *this* principle, that the action itself is founded merely upon a conscientious obligation; for, in point of law, the certificate had exonerated him from the payment of the debt; the fresh promise, therefore, was made from a conscientious motive. But were he liable to be arrested and imprisoned on such promise, "it would be taking advantage of conscientiousness to use it against conscience;" an action, however, will lie on such promise. Bur. 737.

Why.

But if the commission, or the certificate, be fraudulent, the court will not discharge the bankrupt on common bail. *Sowley v. Jones*, Blac. 725. *Martin v. O'Hara*, Cowp. 823. *Robson v. Calze*, Do. 228.

Commission must not be fraudulent.

But in all such cases the defendant should plead his bankruptcy; for if he might do so, and neglects it, and a judgment is obtained, he shall be liable to be arrested in debt on such judgment; nor will the court go further back than the judgment to inquire into the time of the bankruptcy. *Combes v. Blackall*, Str. 477.

Defendant must plead his bankruptcy in time.

If therefore, defendant has obtained his certificate in time, it may be pleaded; but if not properly allowed and obtained till after judgment, he must apply to a judge, or move the court for his discharge, and verify the certificate by affidavit. *Tarlton v. Fisher*, Do. 671. *Graham v. Benton*, 1 Wil. 41.

If certificate not obtained time enough to plead it, how to proceed.

And even should he, after judgment obtained, bring error, in order to delay execution until his certificate be allowed,

Whenever certificate obtained, he may be discharged.

allowed, and afterwards pending error, obtain such certificate, he may be discharged. *Id.*

Which discharge is founded upon the 5 G. 2. c. 30. s. 13.

Discharge only extends to his person, not his goods.

But such discharge only extends to the *person*, not to the goods of the bankrupt; and the above last cited case must be so construed. If, therefore, an execution against the goods of a bankrupt be taken out after his certificate is signed by the creditors, and before it is allowed by the chancellor, it is valid. *Callen v. Meyrick*, 1 D. & E. 361.

Insolvent debtors and fugitives.

Another peculiar circumstance which exempts a person from being arrested, is, the having been discharged since the cause of action accrued on any of the insolvent acts, either as an *insolvent debtor* or a *fugitive*; for, by these acts, after such discharge, the *person* of the debtor is free from arrest for any cause of action accruing before the time mentioned in such act, but his *property* is still liable; for the debt itself is not extinguished, as in the case of a certificated bankrupt.

To whom as fugitives the acts extend.

By the acts of parliament, with respect to fugitives, they must be such persons as went abroad for the purpose of avoiding their creditors. If, therefore, they go there for the purpose of trading, or have chiefly lived and contracted their debts there, they will not be deemed fugitives within the acts. *Sheldon v. Foot*, Say. 308; *Honour v. Wetherhead*, 1 Wil. 85.

To what debts the acts extend.

A debt due, by bond or promissory note, given before the day mentioned in the insolvent act, though not payable till after, is *debitum in presenti* though *solvendum in futuro*, and defendant so discharged shall not be liable to be arrested thereupon; but otherwise of a debt payable upon a contingency, from which he would not be discharged, unless the contingency had happened before the day mentioned in the act. *Paget v. Wheate*, Do. 671. *Workman v. Leake*, Cowp. 22.

To what places.

These acts only extend to England; a discharge upon such an act passed in Ireland not sufficient. *Denbury v. Perrew*, 1 Barn. 420.

Persons superseded in a prior action for the same cause.

A third circumstance which exempts a person from being arrested, is, the having obtained a *superfedeas* in a prior action brought for the same cause; in which case, his *person* is afterwards free from arrest for such debt or demand, though his *property* is still answerable.

The effect of a subsequent promise.

Nor will any subsequent promise, in either of the two last cases, be a sufficient ground for arrest.

Thus,

Thus, where a defendant, having given his note for 36l. was discharged on an insolvent debtor's act, and afterwards promised to pay the debt by instalments, and actually did pay some of the instalments, upon his being arrested for the residue, he was discharged upon common bail. *Turner v. Scomberg*, Str. 1233.

It will not render them liable to an arrest.

In like manner, where the defendant, being arrested for 25l. lay in gaol till he was superseded, and the plaintiff, meeting him afterwards, got a note of him for 20l. and brought a fresh action upon it, and held him to bail, the court discharged him upon common bail. *Taylor v. Wasteneys*, Str. 1218.

And upon this principle, that such subsequent promise being made without any new consideration passing, the old debt is still in existence, and is, in fact, the real cause of action. Since, therefore, the defendant would not be liable, after such discharge or *supersedeas*, to be arrested for the original debt, neither shall he be so by virtue of such subsequent promise, made without any fresh consideration.

Why.

Under this head may be classed all actions brought upon illegal considerations, or even where the legality of the contract is doubtful; in which cases, if the defendant be arrested, the court, on affidavit of the fact, will discharge him on common bail. *Sumner v. Green*, C. B. T. R. 301.

Common bail in actions on illegal considerations.

Thus have we endeavoured to point out the various considerations necessary to be attended to, for the better ascertaining whether special or common bail only is required; and to shew, that it depends first upon the nature and object of the action itself; secondly, upon the person against whom it is brought; and, lastly, upon particular circumstances which may render it an exception to the general rule; it only now remains, before we conclude this chapter, to make a few general remarks upon

SECTION IV.

The Consequences of arresting any Person not liable to be arrested, by reason of Privilege or otherwise, and of their Remedy and Discharge.

If a person, in any common case, arrest another, and hold him to special bail, without having some cause of

action

In common cases, the remedy by action for malicious arrest.

action against him amounting to 10l. such person will be liable to an action upon the case, for maliciously holding him to bail.

So if he hold him to bail for a much greater sum than is due.

Original suit
must be first de-
termined.

But before such action, for maliciously holding to bail, is brought, the first action on which the arrest is wrongfully made, ought to be determined. *Morgan v. Hughes*, 2 D. & E. 232.

Against whom
such action to
be brought.

And this action can only be brought against the party at whose suit such arrest was made; for neither the sheriff, or his officers who made the arrest, are liable. *Tarleton v. Fisher*, Do. 677. Nor the attorney who sued out the writ, although he well knew that there was no cause of action, and was even himself a witness to the payment or release of the debt for which defendant was arrested; for what an attorney does, is only as servant to another, and in the way of his calling and profession. *Barker v. Bramham & Norwood*, 3 Wil. 379.

If defendant be held to bail, and no just cause of action exists, the Court of King's Bench will not, upon motion, discharge him, because they will not enter into the merits upon affidavits, but will leave the party to his remedy by indictment or otherwise, if plaintiff has sworn falsely; but the practice of the Common Pleas seems otherwise.

Of the remedy
in case of a pri-
vileged person
being held to
bail.

Where there is a just *bailable* cause of action, but the defendant is not subject to an arrest by reason of his *privilege* or *protection*, as before described; the remedy, in case he be arrested, notwithstanding such privilege may be by a summary application to the Court.

Doubt as to any
action being
maintainable.

As to any *action* for damages, in such case, it seems somewhat doubtful, whether it can be maintained. In the case of *Cameron v. Lightfoot*, Blac. 1194. De Grey, C. J. took pains to discourage the kind of action; and although he did not positively give it as his opinion, that in no such case an action would lie; yet he strongly intimated the difficulty of supporting it; and that the unfrequency of such actions was no slender proof of the general opinion concerning them. For though, says he, in many cases (speaking of privileged persons being arrested) the process is declared *void*; yet in *none* has any instance been produced, of an action of false imprisonment being brought.

No instances.

A difference be-
tween arrest on
void process,
and at a wrong
time.

He makes, however, a difference (and surely justly) between cases where the process itself is *void*, (as of arrest on Sundays, of ambassadors, and the like,) and where

where (as in the case of Cameron and Lightfoot, which was an action for arresting the plaintiff, *redeundo as a witness* from the court) the writ is not void, nor the arrest illegal, but only improperly *timed*.

In the first, De Grey seemed doubtful; but in the last, the court were unanimous, that no action would lie, although the officer, if he knew the circumstances, might possibly be punishable for the contempt.

In last certainly no action.

But although such actions may be unfrequent, yet in strictness of law, an action of trespass will lie for arresting a privileged person, provided the writ on which such arrest was made be first *superfeded*, but not otherwise; for till then it will be a justification. Per Buller, J. *Tarleton v. Fisher*, Do. 677. *Parsons v. Lloyd*, 3 W. 341.

In first one will lie,

Such action must be brought against the party, not against the sheriff, or his officers. For it is settled, that no sheriff, nor his officer is liable to an action for false imprisonment for arresting any privileged or protected person, as a certificated bankrupt, a feme covert, a peer, a discharged insolvent, and the like.—Ib. Nor for arresting an attorney, though the sheriff was served with a writ of privilege. *Crossley v. Shaw*, Blac. 1085. (The arresting of an ambassador, or his servant, properly registered agreeable to act of parliament, is an exception; for in such case, the bailiff would be liable by the statute 7 Ann.)

against the party, not the officer; who is adjudged not liable.

(Exception as to ambassadors.)

If, however, they should do any thing oppressive, after full notice of all the circumstances, an action on the case might, *perhaps*, be maintained against them. Ib. *Tarleton v. Fisher*, Do. 676.

Perhaps otherwise in cases of oppression.

But the general rule, with respect to sheriffs and their officers, is, that a sheriff is bound to execute process issuing out of a court of competent jurisdiction, and though there be no cause of action, or the process be erroneous, the sheriff is not responsible. Ib.

General rule as to sheriff's justification.

But the chief object, when a privileged person has been arrested, is to obtain his *discharge*.

Discharge of persons privileged.

And it is now finally settled by Pitt's case, Str. 985, that a person entitled to privilege may be discharged upon motion, but it is discretionary in the Court, as if there is a doubt whether the party applying be really a person entitled to privilege or the like. Per Ld. Kenyon, in *Bartlett v. Hobbes*, 5 D. & E. 689.

In which case they may put him to his plea of privilege. So a feme covert, if arrested, may be discharged on motion.

Feme coverts.

The

Infants.

The court will not discharge infants on motion, but will put them to their plea of infancy.

Attornies.

In what cases attornies may be discharged on motion, see vol. 2. *Proceedings by and against Attornies.*

As to a certified bankrupt, how to get discharged.

Formerly, when a bankrupt was arrested, and held to bail, who was entitled to his discharge, the method was, for the bail to surrender defendant, and then for him to apply to be discharged, upon an affidavit, stating the facts of his having become bankrupt since the cause of action arose, and having obtained his certificate. But now, where a bankrupt is clearly entitled to his discharge, the court, to avoid circuitry, will order an *exoneretur* to be entered on the bail-piece on motion made for that purpose, without the form of a regular surrender by his bail. *Martin v. O'Hara*, Cowp. 824.

Ancient practice.

Modern.

When on motion.

If he be arrested, but not held to bail, his discharge may be effected by motion on his filing common bail.

Which is a rule nisi, and what may be shewn for cause against it.

But this is a rule *nisi* in the first instance; and it will be open to the plaintiff to shew any cause he thinks proper against it; and if it appear, upon such cause shewn, that the commission was fraudulently issued, or that defendant had concealed part of his effects, or had obtained his certificate surreptitiously, they will discharge the rule. *Sowley v. Jones*, Black. 725. *Robson v. Calze*, Do. 228. *Vincent v. Brady*, C. B. Mich. 32 G. 3.

Feigned issue directed, if doubtful.

And should the court not choose, in such case, to determine the matter upon affidavits, they will direct a feigned issue to try the question. *Robson v. Calze*, Do. 228.

As to insolvent debtors and fugitives;

Discharged *insolvent debtors* and *fugitives* may, if wrongfully arrested, move the court for a rule to shew cause why they should not be discharged on common bail, on producing the proper duplicate, as such insolvent debtor or fugitive.

how to get discharged.

At what time.

And this, even after they have put in bail. *Baxter v. Overton*, Bar. 102. for they may be deemed in *custody* of their bail.

What cause may be shewn against the validity of the duplicate.

But plaintiff, notwithstanding the duplicate, may shew cause against its validity; as that, at the time defendant is said in the duplicate to have been abroad as a *fugitive*, he was abroad in the course of his trade, which is sufficient for court to discharge the rule. *Sheldon v. Foot*, Say. 308.

But in the case of *Norton v. Lutwidge*, Bar. 105. the court would not enter into the point, whether defendant was within the statute; or whether, on the face of the duplicate

duplicate the sessions had exceeded their authority; but said, that the quarter sessions were to determine as to the immediate liberty of the party, and afterwards the court, or a judge, were to discharge the defendant on producing his duplicate; plaintiff, therefore, may put any point on trial, but defendant must not remain in *vinculis* till determination. But see 1 Barn. 420.

Such, then, are the consequences of arresting, and holding to bail, any person not liable to be arrested, whether by privilege, or otherwise; such their remedy by action; and such the general methods of obtaining their discharge. It need only further be observed, that in all cases not mentioned here, if any privileged or protected person be wrongfully imprisoned, and held to bail, the usual mode of redress is, by application to the court.

It is to be observed, that the privilege of arrest, and holding to bail, is not a privilege of the person, but of the office. A person who is not a justice of the peace, or a magistrate, cannot arrest, or hold to bail, any person, though he may be a justice of the peace, or a magistrate, in some other office. The privilege of arrest, and holding to bail, is a privilege of the office, and not of the person.

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CHAPTER III.

Of the Mode of proceeding when common Bail only is required from the Commencement of the Suit to the Declaration.

HAVING in the last Chapter considered the criteria by which an action may be distinguished to be bailable or *not* bailable, we proceed now with our main design, to shew the method of commencing and prosecuting suits in the respective courts; but as this method is materially different according as the defendant is to be arrested or not, which difference chiefly consists in the *process*, that is to say, in the means used to compel the defendant to appear in court; we shall, for the sake of perspicuity, treat of the practice in each of these cases separately and distinctly, from the commencement of the suit until the *declaration*; at which point, the proceedings as it were meet, and are afterwards carried on in nearly the same uniform course.

The proceedings in actions not bailable, governed by different statutes.

Whenever the action is not a bailable action, or if it be*, and plaintiff does not wish to hold defendant to special bail, the mode of proceeding, to bring the defendant into court, is clearly pointed out by the following statutes.

Defendant must be personally served with process,

By the 12 G. 1. c. 29. s. 1. (made perpetual by 21 G. 2. c. 3.) in all cases where the cause of action shall *not* amount to the sum of 10l. or upwards, the plaintiff or plaintiffs shall not arrest, or cause to be arrested, the body of the defendant or defendants; but shall *serve* him, her, or them, *personally*, within the jurisdiction of the court, with a *copy of the process*.

indorsed with attorney's name,

By the 2 G. 2. c. 23. s. 22. (made perpetual by 30 G. 2. c. 19.) every *copy* of any writ or process that shall be *served* upon any defendant, shall, *before* the service thereof, be *subscribed* or *indorsed* with the *name of the attorney* or solicitor, written in a common legible hand, who shall be immediately retained or employed by the plaintiff in such writ or process.

* Although the cause of action be bailable, yet plaintiff is not obliged to arrest defendant, and hold him to special bail; but he may decline making any affidavit, and by 12 G. 1. c. 29. s. 2. proceed by serving him with process, as directed by that statute in actions not bailable.

By

By the 5 G. 2. c. 27. f. 4. (made perpetual by 21 G. 2. c. 3.) upon every copy of such process to be served upon any defendant, shall be written, in words at length, in a common legible hand and character, an English notice to such defendant of the intent and meaning of such service, and desiring the party to appear on the day mentioned therein, and for which no fee or reward shall be taken; the form of which notice is prescribed in the act.

and notice to appear annexed.

By the same statute, f. 2. no attorney shall charge more than 5s. for the making and serving a copy of such process on defendant.

5s. only to be charged for service.

And by the statute, 12 G. 1. c. 29. f. 1. (first above-mentioned), if such defendant or defendants shall not appear at the return of the process, or within four days (now extended to eight by 5 G. 2. c. 27.) after such return, it shall be lawful for the plaintiff or plaintiffs, upon affidavit being made, and filed in the proper court, of the personal service of such process as aforesaid (which said affidavit shall be filed gratis), to enter a common appearance, or file common bail for the defendant or defendants, and to proceed thereon, as if such defendant or defendants had entered his, her, or their appearance, or filed common bail.

If defendant do not appear, plaintiff may appear for him.

Such are the general directions given in the above statutes, for the regulation of the proceedings in all actions wherein special bail is not required, from the commencement thereof to the bringing of the party into court, i. e. to the declaration; the summary of which is, that "a copy of process duly indorsed or subscribed with the attorney's name, and with a notice thereunto annexed, requiring defendant's appearance in court at the time mentioned therein, is to be served personally upon defendant; and if the defendant do not appear accordingly, plaintiff may, upon an affidavit of such personal service of the copy of process, appear for him, and then prosecute the suit to judgment."

A summary of the above.

From the above short statement, four things naturally present themselves to our consideration, viz.

SEC. I. *The PROCESS, with a Copy of which Defendant is to be served.*

SEC. II. *The SERVICE of Process upon the Defendant.*

SEC. III. *The Defendant's APPEARANCE according to Process.*

SEC. IV. *The Plaintiff's appearing for Defendant according to the Statute.*

To which may be added,

SEC. V. *Some Observations on Defects and Irregularities in the Process, and the Service thereof.*

SECTION I.

Of the Process and its Incidents.

(A) Of the several Kinds and Forms of Process,

(B) How to sue out Process.

(C) Of the Notice to appear subscribed thereto.

(D) Of the Indorsement of the Attorney's Name thereon.

(E) General Observations as to the Extent, directing, filling up, and Time of suing out Process.

(A) Of the several Kinds and Forms of Process.

THE several kinds of process in both courts have been already enumerated in the *Introduction* to this work; and, in all actions between common persons, (except where the proceedings are by *special original*, or original *quare clausum fregit*, which will be treated of in another place,) the first process in the Court of King's Bench is a *bill of Middlesex*, if the defendant is to be served in Middlesex; and, if elsewhere, a *latitat*: in the Common Pleas, let the defendant reside where he may, it is a *capias*.

If the defendant cannot be found and served with the process before it is returnable, further process must issue, which is called in K. B. an *alias bill*; or, if the first writ was a *latitat*, an *alias capias*; and in C. B. it is termed a *capias by continuance*; and if these be not duly served before the time of their return, a *pluries bill* or *pluries capias* may issue in K. B., or another *capias by continuance* taken out in C. B. according to the first process, and the court in which the action is brought; and if defendant is to be served in any liberty, process called a *non omittas bill* or *capias* must issue.

The above several kinds of process are printed with proper blanks, and sold at the different law stationers.

Their respective forms are as follow:

Form

Form of Writs in King's Bench.

Bill of Middlesex.

*Middlesex, } The sheriff is
to wit. } commanded to take
Thomas Scott (b) and John
Doe (c), if they may be found
in his bailiwick, and safely
keep them, so that he may
have their bodies before the
Lord the King at Westminster,
on Saturday next after the
morrow of the Holy Tri-
nity (d), to answer Samuel
Day in a plea of trespass (e);
and that he may have there then
this precept (f).*

(i) By Bill,

Mansfield and Way (b).

(k) Mr. Thomas Scott, you
are served with this process to the
intent that you may, by your at-
torney, appear in his Majesty's
Court of King's Bench at the
return thereof, being the 16th
day of June next, in order to
your defence in this action.

Latitat.

*George the Third, by the Grace
of God of Great Britain, France,
and Ireland King, Defender of
the Faith, &c. To the sheriff
of Buckinghamshire (a) greet-
ing: Whereas we lately com-
manded our sheriff of Middlesex,
that he should take Thomas
Scott (b) and John Doe (c), if
they might be found in his baili-
wick, and safely keep them, so
that he might have their bodies
before us at Westminster at a
certain day now past, to answer
Samuel Day in a plea of tref-
pass (e); and our said sheriff of
Middlesex, at that day, returned
to us, that the said Thomas
and John were not found in his
bailiwick. Whereupon, on the
behalf of the said Samuel, it is
sufficiently testified in our Court,
before us, that the said Thomas
and John do lurk and secrete
themselves in your county; there-
fore, we command you, that
you*

Alias

(a) The direction of the writ to the proper sheriff or officer who is to execute it; and if in a county palatine, to the chancellor or bishop, as the case may be.

(b) The real defendant's name, if only one.

(c) If two defendants, this is also to be the real defendant's name; but if only one defendant, this blank to be filled up with John Doe or Richard Roe; the writs being printed in the plural number.

(d) The day that you make the writ returnable.

(e) If the writ is bailable, here the *ac etiam* is inserted:

In the bill of *Middlesex*, thus: And also to a bill of the said Samuel, to be exhibited against the said Thomas, for sol. upon promises, (or as the case may be,) according to the custom of the court of our lord the king, before the king himself.

In the *latitat* thus: And also to a bill, &c. according to the custom of our court, before us.

(f) The bill of *Middlesex* is only a precept, and has no teste; the *latitat* being a writ, is tested.

(g) The teste of the writ, viz. the day when it is sued out.

(h) The chief clerk of the court's name, by whom the writs are sealed.

(i) If the writ is bailable, here is inserted the sum sworn to, thus: Oath for sol. per affidavit filed, Thomas Smith, attorney. This is usually indorsed on other writs.

(k) If the action be bailable, and the defendant is to be arrested, (but not otherwise,) this notice is omitted in the process.

Alias Bill.

Middlesex, } The sheriff is com-
to writ. } manded, as before
he was commanded, to take,
&c.

Pluries Bill.

Middlesex, } The sheriff is
to writ. } commanded, as
oftentimes he hath been com-
manded, to take, &c.

Non Omittas Bill.

Middlesex, } The sheriff is
to writ. } commanded that he
omit not by reason of any li-
berty in his bailiwick, but that
he enter the same and take.

you (m) take them, if they shall be
found in your bailiwick, and then
safely keep, so that you may have
their bodies before us at West-
minster, on Saturday next after
eight days of the Holy Tri-
nity (d), to answer the said
Samuel of the plea aforesaid; and
have you there then this writ (f).
Witness Lloyd Lord Kenyon, at
Westminster, the 15th day of
June, in the 37th year of our
reign (g).

Mansfield and Way (h).

Here is subscribed a notice the
same as to the bill of Middle-
sex (k).

Alias Capias.

George, &c. To the sheriff, &c. greeting: We command you,
as before we have commanded you, that you take Thomas Scott
and John Doe, if they may be found in your bailiwick, and safely
keep them, so that you may have their bodies before us at West-
minster, on Monday next after 15 days of the Holy Trinity, to
answer Samuel Day in a plea of trespass (e); and have you there then
this writ. Witness, &c.

Mansfield and Way.

Pluries Capias.

Same as above, only instead of the words as before, say, as we
have oftentimes commanded you.

Non Omittas Capias.

Same as above, only say, We command you, that you omit
not by reason of any liberty in your county, but that you enter
the same and take, &c.

Writs to the Counties Palatine.

Same as *initiat* above, with the addition in the body of the writ
as at note (m), and a proper direction, as post (C).

(m) If the writ is to be executed in the county palatine of Lancaster or
Chester, you here say: We command you, that by our writ, under the seal of our
said county palatine, to be duly made, and to be directed to the sheriff of our said
county palatine, you command the said sheriff that he take, &c. But if the writ
is to be executed in the county palatine of Durham, you here say: We
command you, that by our writ, under the seal of your bishoprick, in due manner to
be made and directed to the sheriff of the county of Durham, you cause the said
sheriff to be commanded that he take, &c.

Ely is only a royal franchise, so no difference in the forms of process exe-
cuted there.

For further information as to the directing and filling up process, see this
Section (E).

From

Form of Writs in Common Pleas.

Capias Quare Clausum fregit.

George the Third, by the Grace of God of Great Britain, France, and Ireland King, Defender of the Faith, and so forth. To the Sheriff of Middlesex (a), greeting: We command you (m), that you take Thomas Scott (b), late of Westminster in your county, yeoman, and John Doe (c), late of the same place, yeoman, if they shall be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at Westminster, on the morrow of the Holy Trinity (d), to answer Samuel Day in a plea, wherefore, with force and arms, the close (e) of the said Samuel, at Westminster, they broke, and other wrongs to him did, to the great damage of the said Richard, and against our peace (f); and have you there this writ. Witness Sir James Eyre, Knight, at Westminster, the 10th day of June in the 37th year of our reign (g).

(b) Mr. Thomas Scott, you are served with this process to the intent that you may, by your attorney, appear in his Majesty's Court of Common Pleas, at the return thereof, being the 16th day of June instant, in order to your defence in this action.

Capias by Continuance.

This is precisely in the same form as the above *capias*, without any addition, as before we have commanded you, or the like; the only difference is in the *præcipe*, where it is called *capias* by continuance. See this Section (B).

Non Omittas Capias.

Same as common *capias*, only saying, We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take, &c.

Testatum Capias.

This writ was similar in principle to the *latitat* in K. B.; after reciting the first *capias*, it then stated, that it was testified that defendant doth lie hid, and runs from place to place in your county, &c.; so that when the defendant could not be found in the first

(a) (b) (c) (d) See the notes to the above writs in King's Bench.

(m) If the writ is to be executed in any county palatine, then let it be as directed *ante* in note (m) to the *latitat* in K. B.

(e) This is the constant form of this writ, brought for a pretended trespass, and therefore called a *quare clausum fregit*. For explanation thereof, see the Introduction to this work.

(f) If it is a bailable writ, here insert the *ac etiam* thus: And also, that the said Thomas Scott may answer the said Samuel Day, according to the custom of our court of Common Bench, in a certain plea of trespass on the case upon promises, (or as the cause of action may be,) to the damage of the said Samuel of 100l.

(g) Teste of writ, viz. the day when sued out.

(h) This notice to be omitted if defendant is arrested, and writ to be indorsed, with the sum sworn to, and the plaintiff's attorney's name.

PROCESS IN ACTIONS [Ch. III. (A)]

county, a new *capias* issued, called a *testatum capias*, to the sheriff of the county where he was to be found; but, since the rule of Hilary Term 1782, this writ has been out of use. For the reason of which, see Ch. IV. Sec. II.

Writs to Counties Palatine.

Same as common *capias*, with proper direction, as post (C), and the insertion mentioned in note (m).

✎ It is to be observed, that under this head are contained the forms of writs in bailable actions as well as in actions not bailable: this was done to prevent the repetition which would otherwise have occurred in the next Chapter, and to render the subject more clear and explicit.

(B) How to sue out the Process.

When an action is to be commenced, the first step necessary to be taken in both courts, is to procure a *memorandum* or minute of the warrant, to prosecute on a 2s. 6d. stamp, agreeable to stat. 25 Geo. 3. c. 80. They may be bought at the law-stationers, or had of the officer who signs the process. See *ante*, chap. I. sec. 2. (C).

The next thing is to make out a *præcipe*, which is a mere note or abstract, written on a slip of unstamped paper, containing the nature of the process, the time when returnable, and the names of the parties, and of plaintiff's attorney. It is left with the officer who signs the process, and serves as his order or warrant for so doing, and also as instructions to him to make a proper entry of such process having issued, which is afterwards done in a book or on rolls kept for that purpose.

In the Introduction to this work, sec. 3. it is observed, that there were two kinds of original writs, a *præcipe quod reddat* and *si te fecerit securum*, or *pone*, which issued out of the Court of Chancery; and that formerly, when either of them were applied for, they were procured by a note to the *curfitor*, called a *præcipe* or *pone* according to the nature of the writ. This was always done in the Court of Common Pleas, and in the King's Bench, when proceedings were by special original. If they were by bill, there was no occasion for any such note or *præcipe*, as the original bill was filed; and the chief clerk upon that issued his process of the bill of Middlesex; but afterwards, when it became the practice not to file the original

Præcipe,
what.

Its origin.

ginal bill in K. B., nor to sue out the special original in C. B., but the *first* process in the one court became the bill of Middlesex or latitat, and in the other, *capias quare clausum fregit* (as may be seen in the Introduction, sec. 1, 2, 3.); it then became necessary, in all cases, to leave a note or memorandum of such process issuing with the proper officer, which is now, in all cases, called a *præcipe*. This serves as the document, from which an original bill in K. B. or original writ in C. B. may be afterwards made out if necessary.

In the Common Pleas, the *filazer* enters these *præcipes* Its use. on a roll, which, at the end of the Term, he delivers to the curfitor, who makes out the originals from them, all at once, to be filed with the *custos brevium*. But these originals are nothing more than printed blank forms of the *clausum fregit*, filled up by the *curfitor*, with the parties' names, &c. neither stamped nor sealed, but filed with him *pro formâ to give the Court jurisdiction*. These, however, will not do if a writ of error be brought after judgment by *default*; for then a special original in C. B., as was formerly necessary in the first instance, must be sued out, which is obtained by petition to the master of the rolls. So also is the original bill in K. B., if required, upon error brought. But, after *verdict*, the want of both are cured by the statute of *jeo faille*. As therefore, in the King's Bench, the student should always bear in mind the distinction between the *original* bill, or bill in trespass, and the *process* of the bill of Middlesex; so in the C. B. he should equally remember the difference between the real special original, by which all proceedings in that court are supposed to be, and the common *capias quare clausum fregit*, which, in strictness, is only *mesne* process, as founded upon such original writ.

The Form of the *Præcipe* as now used, is as follows:

In K. B.

In C. B.

For bill of Middlesex.

Middlesex. *Bill for Samuel Day against Thomas Scott (a), returnable on Monday next after the morrow of the Holy Trinity.*

Thomas Smith, attorney.

June 10, 1797.

Middlesex. *Capias for Samuel Day against Thomas Scott, trespass at Westminster (a), returnable on the morrow of All Souls.*

Thomas Smith, attorney.

June 10, 1797.

(a) If it is to be a bailable writ, with an *ac etiam*, here insert in the *præcipe*, "*Case for 50l. upon promises*," or as the cause of action may be.

PROCESS IN ACTIONS [Ch. III. (B)]

For Latitat.

Surry. Latitat for Samuel Day against Thomas Scott, trespass (a), returnable on, &c. (as above).

Thomas Smith, attorney.

June 10, 1797.

So are all other præcipes, only say, alias bill, or pluries bill, or non omittas bill, or alias capias, non omittas capias, or the like, according to the writ you want, and put the date when the first writ issued on the præcipe.

N. B. If the writ is to go to a county palatine, or the cinque ports, the præcipe is as above; only in the margin, instead of the county, say county palatine of Chester, or cinque ports, as the case may be.

Having procured the memorandum of warrant (b), and prepared the præcipe, which is necessary in both courts, proceed as follows:

In the King's Bench.

By Bill of Middlesex.

How to sue out process.
Bill of Middlesex.
Latitat.

Get a blank bill, which may be bought at the stationers, or had at the Bill of Middlesex Office; fill it up; take the bill, præcipe, and memorandum of warrant, to the Bill of Middlesex Office, and the officer will sign it, for which, if in Term, pay 6d.; if in vacation, 10d. Leave the præcipe and memorandum of warrant at the office. — The bill of Middlesex is not to be sealed.

Alias bill.
Alias capias.

By alias bill.] If defendant be not served with the bill of Middlesex before the return thereof, sue out an alias bill.

Pluries bill.
Pluries capias.

By pluries bill.] If the alias be not served before the return, sue out a pluries bill.

Capias by Continuance.

As above, only say capias by continuance, for, &c. and put the date of the first writ on the præcipe.

So of a non omittas and the like.

By Latitat.

Get a blank writ, to be bought at the stationers, or had at the K. B. Office; fill it up, carry it, with the præcipe and memorandum of warrant, to the King's Bench Office to be signed; pay the officer for signing 2s. 6d.; leave the præcipe and memorandum of warrant with him. Then carry writ to Seal Office; pay for sealing 7d.

By alias capias.] If the defendant be not served with the latitat before the return thereof, sue out an alias capias.

By pluries capias.] If the alias be not served in time, sue out a pluries capias.

(a) Vide the note in the preceding page.

(b) If a bill of Middlesex has been, in fact, sued out, and afterwards it be found necessary to sue out a latitat, the old memorandum of the warrant which was got for the bill of Middlesex will be sufficient; only add to the præcipe for the latitat, "Bill of Middlesex sued out the 10th day of June 1797."

The mode of suing out the alias and pluries is the same as the bill of Middlesex, only in the præcipe for the office, add the word alias or pluries bill, and also insert the date when the first bill of Middlesex issued. Pay no more than 2d. for signing, whether in Term or vacation. They are not sealed.

Non omittas bill.] If defendant is to be served in any liberty, sue out a non omittas bill; and if that be not served in time, an alias and pluries non omittas. They are sued out in the same way as the bill of Middlesex, and the same fees paid; only in the præcipe call it, "non omittas bill of Middlesex."

The alias and pluries capias are sued out in the same way as the latitat, only nothing is paid for the signing, but 7d. for the sealing.

In the præcipe for the office say, alias or pluries capias, instead of latitat, and insert the date when the latitat issued.

Non omittas capias.] If defendant is to be served in any liberty, sue out a non omittas capias; and if that be not served in due time, an alias and pluries non omittas. These are sued out in the same way as the alias capias or latitat; only in præcipe, say, "Surry non omittas capias." Pay for signing 2s. 6d. sealing 1s. 2d.

Non omit. bill.
Non omit. cap.

The return of a *mandavi ballivo*, which was formerly necessary, is now presumed and dispensed with; and the non omittas bill, or capias, may be sued out in the first instance, without any previous writ or return.

Sued out in first instance.

If, after having sued the *pluries* bill, or *pluries capias*, or *pluries non omittas*, as the case may be, defendant still be not served before the writ is returnable, then sue out another *pluries* in the same way as the last, and so continue them from Term to Term, still putting in the *præcipe* the date when the first process issued.

Pluries writs continued from Term to Term.

It is said in some books, that *pluries* writs can only be continued for four Terms, at the end of which a new bill of Middlesex or latitat must be sued out; but I conceive a new bill of Middlesex or latitat is only necessary if plaintiff lies by for four Terms.

New writ only, if plaintiff lies by four terms.

In the Common Pleas.

Having procured memorandum of warrant, and prepared *præcipe* as above, take the *præcipe* and memorandum of warrant to the proper filazer, who will make out the capias, and sign the same; and, at his leisure afterwards, as observed above, will procure the original writ from the clerk to warrant it, which he returns, and files of course; pay him for signing capias 2s. 2d. sealing 7d.

Capias.

Capias by continuance.

If defendant cannot be served before the return thereof, sue out a capias by continuance (a), which is precisely the same as the first capias, only put in the præcipe the words capias by continuance, and also the date when the first writ issued. If the capias by continuance be not served in time, sue another capias by continuance, and so on from Term to Term; pay signing these writs 10d. sealing 7d.

Non omittas capias.

Non omittas capias.] If defendant lives, or is to be served in a liberty, then sue out a non omittas capias, in same manner as common capias, only in præcipe call it "non omittas capias."—It may be sued out in the first instance; if not served in time, sue out an alias and pluries non omittas capias, always putting in præcipe the date when the first writ issued.

Such is the mode of suing out process in the respective courts of King's Bench and Common Pleas.—A copy of this process is to be served on defendant; but it is previously necessary, that to such copy of the process, let it be what it may, whether bill of *Middlesex*, *latitat*, or *capias*, there should be annexed, or subscribed, a written notice to the defendant to appear; and also the name of the attorney retained by plaintiff indorsed thereon.—We will consider, therefore,

(C) The Notice to appear, to be inserted in the Copy of such Process.

(C. 1) The Intent and Form thereof.

(C. 2) How Notice should be filled up.

(C. 3) In what Cases necessary.

(C. 1)

By the 5 G. 2. c. 27. f. 4. upon every copy of such process to be served upon any defendant, shall be written, in words at length, in a common legible hand and character, an *English* notice to such defendant, of the intent and meaning of such service, to the effect following, viz.

Form of notice.

A. B. You are served with this process to the intent that you may, by your attorney, appear (b) in his Majesty's court of at the return thereof, being the day of (as the case shall happen to be), in order to your defence in this action.

(a) So called, because it is continued on the roll by the filazer from the time the first writ issued, and so on from Term to Term, until the defendant is served.

(b) If it be against husband and wife, say, for yourself and Mary your wife, or as her christian name may be.

And

(C. 2) How Notice should be filled up.

(C. 2)

There are only three blanks in the above form to be filled up; first, the *name of the party* to whom it is addressed; second, the *court in which* he is to appear; third, the *day on which* he is to appear.

How to fill up the notice.

As to the first, the *name of the defendant* must be mentioned in the notice; nor is it sufficient merely to say, *you are served, &c.* *Behema v. James*, 1 Wil. 104. *B. R. Worgman v. Plank*, C. B. T. R. 100.

1st, As to the name of the defendant.

If there be several defendants, they must all be named.

And they should be *accurately* named; for if the name in the notice differs from the name in the process, it will be bad. *Simpson v. Claypham*, P. R. 348. *Cromwell v. Goodwin*, Bar. 409.

As to the second, the name of the *court* in which the action is brought, either *King's Bench* or *Common Pleas*, should be properly inserted.

2d, As to the name of the court.

As to the third point, *viz.* the *day* on which he is to appear; it should, perhaps, *strictly* be the day of the month on which the return-day of the process exactly falls; as, supposing the return in a common *capias* to be in eight days of St. Hilary, the notice should be thus:

3d, As to the day on which defendant is to appear.

"*at the return thereof, being the 20th day of January.*"

And this, although the 20th of January should fall on a Sunday. *Alsop v. Bagot*, P. R. 346. *Jenner v. Oatridge*, ib. For if it were made the 21st, it would be bad. *Green v. Watkins*, ib. 347.

Must be the return-day, though Sunday.

The reason of this practice, of giving notice to appear on the Sunday, per *Ld. Mansfield* in the case of *Swan v. Broome*, Bur. 1600. is, "that in ancient times the courts "used to sit upon *Sundays*; whilst they *did* so, the notice "must follow the practice *then* in use, and must of consequence be given for appearing on the Sunday. But "now, that old practice of their actually sitting upon "Sundays, being altered, and at an end, these notices "must necessarily relate to the Monday, when the courts "do sit, and therefore the defendant cannot be misled by "having notice given him to appear on the Sunday."

The reason thereof.

But, with due deference to such authority, this reason does not seem fully satisfactory; because, first, the courts did not sit on Sundays, at the time when the above act passed, namely, the 5 G. 2., nor long before; and therefore there was no such practice *then* in use for the notice to follow; and, secondly, the spirit, and indeed the letter of the act, is clearly otherwise; for it directs, that the plaintiff

Reason not satisfactory.

Why.

plaintiff shall give defendant notice of the *intent and meaning* of the service; the *intent* of which cannot now be for defendant to appear in court on a *Sunday*.

In C. B. notice held good if agreeable to the fact, though not on the return-day.

The Court of Common Pleas, in a late case, were of opinion that the notice was good, though not made for the defendant to appear on the exact return-day, but agreeable to the fact. Defendant was served with a *clausum fregit*, returnable in 15 days of Easter (*i. e.* the 8th of May); but the notice to appear was thus: *at the return thereof, being the 11th day of May 1791 (i. e. the quarto die post)*; and upon shewing cause why proceedings should not be set aside for irregularity, the court said, they were clearly of opinion, that the notice to appear on the *quarto die post* was good, that being the day when, in point of fact, the defendant was to appear. *Summer v. Brady and others*, C. B. T. R. 630.

There is a N. B. in the report of this case, that the old practice of giving notice to appear on the *Effoin-day* (the return of the process) is not done away by this determination.

May be either the effoin-day or quarto die post.

Clearly not; but as the practice now stands, the day in the notice of a *capias* may be made either the actual return-day, as mentioned in the writ; *i. e.* the *effoin-day*, or the day, in fact, when defendant is to appear, *viz.* the *quarto die post*.

No occasion to particularize the year.

Formerly the courts held it necessary for the notice to specify the year as well as the day of the month; or to add the word "instant," or "next." *Wingfield v. Beard*, Bar. 419. *White v. Washington*, P. R. 347.

The day of the month sufficient.

But now these cases are exploded, and it is held sufficient to insert the day of the month, as the 26th of June, without saying "instant," "next," or expressing the year. *The Weavers' Company qui tam v. Forest*, Str. 1233. *Elliott v. Parrot*, Bar. 425.

(C. 3)

In what cases notice is necessary.

In all actions under 10l.; and in C. B. in actions above 10l. if process served;

(C. 3) In what Cases Notice is necessary.

A notice is most unquestionably necessary, by the stat. 12 G. 1. and 5 G. 2. in all cases where the cause of action shall *not* amount to 10l.; and if omitted, proceedings will be set aside.

It also was held necessary in C. B. in *all cases where process is served*, although the cause of action be above 10l. *Longbotham v. Knapp*, Bar. 404. *Atwood v. Meredith*, P. R. 349. S. C. Cooke's Rep. 143. *Cock v. Turner*, ib. 100.

But in the case of *Willis v. Lewis*, in B. R. 1 Wil. 22. ^{but not so in B. R.} it was resolved, *per cur.* that there was *no* occasion to put the notice to appear at the bottom of the process, according to stat. 5 G. 2., it being above 10l. See also Tidd, 97. 30.

This question, however, came before the Court, Trinity Term 1797, on a motion to set aside proceedings for an irregularity in the notice. The process had been *served*, though it were a bailable writ. It was contended, therefore, that no notice at all need have been given, the cause of action being above 10l., and the case of *Willis* and *Lewis* relied on. But Lord Kenyon saw no reason for dispensing with the notice in such cases; and on looking into the acts of 12 G. 1. and 5 G. 2. thought that it was necessary, and rule was made absolute.

Surely such a notice is agreeable both to the letter and spirit of the above statutes. For the 12 G. 1. c. 19. and 5 G. 2. c. 27. being in *pari materia*, and the latter having passed, specifically, for the purpose of explaining and amending the former, must be considered together, and be looked upon and construed as *one* act. Now, by the 5 G. 2. s. 4., a notice is positively directed to be written upon the copy of *every* process *served* on any defendant.

But it may be said, that by that act this clause can only relate to proceedings in actions *under* 10l. Be it so; it must then be looked upon as a *necessary* part of the proceedings, as *directed* by the 12 G. 1. in all cases where the cause of action does *not* amount to 10l.

Now, by the second sect. of that act, it is positively enacted, that if any writ or process shall issue for the sum of 10l. *or upwards*, and *no affidavit* and indorsement shall be made, the plaintiff shall not proceed to arrest the defendant, *but shall proceed* IN LIKE MANNER as is by *that act directed* in cases where the cause of action does *not* amount to the sum of 10l. It would seem, therefore, as if a notice were necessary in both cases, more especially when the intent and spirit of this law are considered; for it is a law in favour of defendant, to put him upon his guard, to explain to him the nature of the process, and warn him of his duty to *appear*. If, then, the legislature thought fit thus to caution defendant in matters of little moment, in actions under 10l., *à fortiori*, is this caution necessary in cases of greater magnitude? The only difference in a bailable writ is the

ac etiam; but that by no means supplies the place of the notice.

(D) (D) Of the Indorsement of the Attorney's Name on the Process.

Indorsement directed by statute.

By 2 G. 2. c. 23. s. 22. it is enacted, that every copy of any writ, or process, that shall be served upon any defendant, shall, before the service thereof, be subscribed or indorsed with the name of the attorney, or solicitor, who shall be *immediately retained*, or employed by the plaintiff in such writ or process.

Omission formerly did not vitiate process.

It was formerly held, that the omission of the attorney's name did not vitiate the process, and proceedings were refused to be set aside upon that account. *Fawkes v. Jay*, P. R. 440. *Blackhall v. Gould*, ib. 441. Bar. 407.

But now it does.

But these cases were previous to the passing of the 12 G. 2. c. 13.; which, though it only immediately relates to *bailable* writs, on which warrants to arrest issue, yet it shews the wish of the legislature to enforce this practice of the indorsement; and since that time such indorsement has been deemed necessary by both courts. In C. B. *Chapman v. Ryall, and others*, Bar. 415. In B. R. Loft. 58. and *Oppenheim qui tam v. Harrison*, Bur. 20; and for want thereof, proceedings may be set aside.

It must be the real attorney's name.

Further, it must be the name of the attorney *actually* retained; for although, in the last case, it appeared that there was a real attorney's name thereto, yet it was put without any authority from him by the plaintiff's attorney, against whom, for so doing, the court granted an attachment. Ib. Bur. 20.

Intent of indorsement.

The *intent* of this indorsement is to shew the defendant who the attorney for plaintiff is, to whom he may apply for information about the suit, or to compromise the action if he thinks fit.

Not necessary if attorney plaintiff.

Where the plaintiff himself, therefore, is an attorney, and sues as such for himself, no such indorsement is necessary. *Fields, one, &c. v. Lewen*, 4 D. & E. 275.

Indorsement of date no part of writ.

Nor is the indorsement of the date on the back of the writ any part of the writ; if the teste is right it is sufficient, though the indorsement be wrong. *Coleby v. Norris*, 1 Wil. 91.

Thus where the writ was in fact sued out on the 24th January 1785, but by a mistake it was indorsed 24th January 1784, the variance at the trial was held immaterial;

terial; but the same mistake having been made in the return of the writ, the judge thought that a material variance, and nonsuited the plaintiff. *Green v. Rennet*, 1 D. & E. 656.

☞ *The process having been thus formally issued, and a written notice to appear, subscribed or annexed thereto, and the attorney's name indorsed thereon, it is completed for service upon the defendant; but, before the treating of the service thereof, it may be useful to make some general observations on the nature and extent of the process, the mode of directing and filling it up, and the time of suing it out.*

(E) Observations on the Process.

- (E. 1) The Nature and Extent thereof.
- (E. 2) How to be directed.
- (E. 3) Of filling up the Process as to Names of Parties, Cause of Action, and Teste and Return.
- (E. 4) Of subsequent and former Process, how they should agree.
- (E. 5) Of the Time when Process may issue; its legal Operation, as to being or not the Commencement of the Suit; and how it may be now pleaded.

(E. 1) Nature and Extent of Process.

(E. 1)

The bill of Middlesex is a mere *precept*, having only a return, and no direction nor *teste*; nor can it run over all England, but is confined to the county of Middlesex. It is a process of the Court, issued by the chief clerk of the court, and not a writ in the name of the king.

Nature and
extent of pro-
cess.

So that if defendant be served with, or arrested upon, a bill of Middlesex, in the city of London, or out of the county of Middlesex, proceedings will be set aside. *Borman v. Bellamy*, 1 D. & E. 187. *Devenege v. Dalby*, Do. 384.

Bill of Middle-
sex.

But if it be doubtful whether the spot where defendant was served be in London or Middlesex, it shall be good service. *Drew v. Marriot*, 1 Wil. 77.

A latitat

**Latitat and
capias.**

A latitat and capias are sometimes considered in the nature of original writs, but sometimes only as process. *Vide post* (E. 5).

**Extent of latit-
tat.**

A latitat is not confined to any particular county, but may be served in any. *Borman v. Bellamy*, 1 D. & E. 187. Even in Middlesex. *Kelly v. Shaw*, 6 D. & E. 74.

For if personal notice be given to the party, it is sufficient, provided it be not a *ailable* process.

**Runs into
Wales,**

Although, after long argument, it was held, that a latitat did not run into Wales (*Lampley, and others, v. Thomas, and others*, 1 Wil. 193.); yet it has since been determined that it does. *Penry v. Jones*, Do. 213.

**and to coun-
ties palatine.**

The latitat and capias extend to a county palatine, and are immediately directed to the chancellor, or the bishop, as the case may be; for the meaning of the expression, *breve domini regis non currit*, is not, that the king's writs are not to be *executed* in such places, but that the Court cannot direct them immediately to the sheriff; if, however, such writ be directed immediately to the sheriff, and it is acted upon, and a bail-bond taken, such proceedings are not void; for the sheriff is bound to obey the process of the Court, although it may be an infringement of privilege; and the chancellor or bishop of the county palatine may interpose, and make his claim accordingly. But 2. Whether on application to the Court such process might not be set aside for irregularity. *Jackson v. Hunter*, 6 D. & E. 73.

(E. 2)

(E. 2) How Process to be directed.

**How process to
be directed ge-
nerally.**

The bill of Middlesex has no direction.

The latitat and capias are generally directed to the sheriff of that county where defendant is likely to be found. To the *sheriff of Berkshire*, and the like.

But there are many cities and towns of exclusive jurisdictions governed by their own officers; some having *two*, and others only *one* sheriff.

The cities of *Bristol, Chester, Coventry, Gloucester, Lincoln, London, Norwich*, and *York*, and the town of *Nottingham*, have *two* sheriffs.

Writs are therefore directed to the *sheriffs* of the city of *Bristol* and the like, and of the town and county of *Nottingham*.

But

But the cities of *Canterbury, Exeter, Litchfield, and Worcester*, and the towns of *Kingston upon Hull, Newcastle upon Tyne, Pool, and Southampton*, have only one sheriff.

Writs are therefore directed to the sheriff of the city of *Canterbury*, and the like, except *Litchfield*, which being a city and county of itself, it is the sheriff of the city of *Litchfield and the county of the same city*.

And to the sheriff of the town and county of *Kingston upon Hull*, and the like.

When they issue to a county palatine, they are directed :

To the *Chamberlain of our county palatine of Chester*, or his deputy, greeting.

To the *Chancellor of our county palatine of Lancaster*, or his deputy there, greeting.

To the *Reverend Father in God, by permission, Lord Bishop of Durham*, or to his Chancellor there, greeting.

But sometimes a particular special direction is necessary; as if the sheriff be a party, the writ would be bad if directed to him, although it were mere process in a common action. *Weston v. Coulson*, Black. 506. But it should in such case be directed to the coroners; and if the coroners be parties also, it should be directed to two persons, either named by the court (3 Black. Com. 354.), or nominated by the master (Imp. 160.), called *elizors*.

How, if sheriff be a party and the like.

(E. 3) Of filling up the Process as to Names of Parties, Cause of Action, and Teste and Return.

(E. 3)

It is not necessary to insert in the process, on what account, or in what right, the party sues; so that executors, administrators, assignees, and the like, need not be described as such in the process; but it may be generally to answer A. B. in a plea, &c.; and they may afterwards declare as executors, &c. or plaintiff, upon such general process, may declare *qui tam*. *The Weavers' Company v. Forest*, Str. 1232. *Lloyd qui tam v. Williams*, Black. 722. So, on the other hand, it was formerly held, that if the process were particular to answer A. B. as executor, administrator, or the like, plaintiff might have declared generally, and not as executor or administrator. Not so, however, if the action had been a *qui tam* action; for

Of the description of plaintiff in process.

Need not state in what right he sues; but process may be general, and plaintiff afterwards declare in special character;

then, if the process were *qui tam*, plaintiff could not have declared generally.

And the reason given for this distinction was, that though the plaintiff may be styled executor, or give himself any other superfluous description in the process, and declare otherwise; yet this will not hurt, for the demand is the same; but in the case where the process is *qui tam*, and the declaration general, the very nature of the demand is altered, the process importing a demand to the king and plaintiff, and the declaration a demand to the plaintiff only. *Lloyd v. Williams*, Black. 722. *Canning v. Davis*, Bar. 494.

This distinction, if closely examined, does not appear very satisfactory; and, indeed, has been since overruled.

but not vice versa.

Where the process being to answer plaintiffs as assignees of a bankrupt, and declaration generally in their own right, proceedings were set aside; and it was held, that plaintiffs could not declare *generally* on process sued out in a *special* character. *Meggs, assignee, v. Ford*, East. 25 G. 3. Imp. 6th edit. 199.

The present practice therefore seems to be, that, upon *general* process, plaintiff may declare in a *special* character, but not *vice versa*.

Of the description and number of defendants in process.

The process should express the defendant by his name of baptism and surname; and if more persons of the same name, a proper distinction should be made, as *elder* or *younger*, &c.; and in C. B. it sets forth his *addition* of place of abode and calling; but that is now become mere matter of form.

Only four in a writ.

No more than four defendants must be put into one writ. This number seems particularly recognized in a rule of Court, 20 Geo. 2. whereby attorneys suing out attachment of privilege against any defendant, are ordered to leave a præcipe with the signer of the writs, with defendants' names, *not exceeding four in each writ*.

It need not be a joint cause of action; if action not bailable, otherwise it must.

It is not necessary that it should be a joint cause of action, because four are inserted; for plaintiff may join four defendants in a latitat for four different and several causes of action, and afterwards declare against all or any of them, as he pleases; the latitat being thus considered as mere process to bring parties into court. *Roe v. Cock*, 2 D. & E. 258.

But this is where the action is *not bailable*; for in a bailable action, the defendant or defendants in that action

Of filling up Process.

only must be inserted in the writ; for the *ac etiam* is a substitute for the original, and must be strictly abided by. If, therefore, two are named in the writ, and one only declared against, proceedings will be set aside. *Holland v. Johnson*, 5 D. & E. 695. *Holland v. Richards*, and *Yardley v. Burges*, ib. 697. *Moss v. Birch*, ib. 792.

It is clearly not necessary in common process, where no special bail is required, to state the particular cause of action: in the Common Pleas the *capias* is *general wherefore he broke the close*; and in the King's Bench it is as *general* to answer plaintiff in a *plea of trespass*, let the cause of action be, in fact, what it may. *Foster & Bonner*, Cowp. 455. See also the *Introduction*.

We have shewn, in the *Introduction*, that as the court of King's Bench originally got cognizance of the cause, upon the supposition of a trespass having been committed, it was formerly held *necessary* to allege a *trespass* in the process; but the jurisdiction of this court being, at this day, firmly established, it is not so strictly insisted upon; so that where the bill of Middlesex was to answer plaintiff in a plea of *debt* instead of *trespass*, the process was held good. *Barber v. Lloyd*, 2 D. & E. 513. *Cox v. Munday*, 1 Blac. 462.

But there is one instance where the cause of action must be inserted in the process, though special bail is not required; which is, in an action against bail upon their recognizance, when the following *ac etiam*, by a particular rule of the court of B. R. (E. 15 G. 2.) must be added after the words, in a plea of *trespass*: "And also to the bill of the said Joseph to be exhibited against the said James in a plea of debt on recognizance, according to the custom of the court of our lord the king before the king himself," if it be a *latitat*; but if a bill of Middlesex, say, "according to the custom of our court before us," otherwise the defendant, or his attorney, shall not be bound to accept of a declaration in debt upon such recognizance. The intent of this rule was to prevent a surprise upon the bail.

The same writ must not contain different causes of actions against different defendants under *several ac etiams*. *Hussey v. Wilson*, 5 D. & E. 254.

A bill of Middlesex is no writ, and has no *teste*.

Every *latitat capias*, &c. must bear *teste* in term, otherwise they are void. *Hart, assignee, &c. v. Hingston*, Bur. 2588. Black. 683.

Of stating the cause of action in process.

Need not be shewn.

Process not bad, though to answer plaintiff in a plea of *debt* instead of *trespass*.

Should state the cause of action if against bail on recognizance.

Of the *teste* and return of process.

Of filling up Procefs.

All procefs
must be tested,

If therefore they be sued out in vacation, they are to be tested the last day of the preceding term. *Johnson v. Smith*, Bar. 964. *Bennet v. Sampson*, Bar. 407.

If sued out in term, they are generally tested the first day of such term, unless it be an *alias* or *pluries* writ; then its teste should be on the return day of the *last* writ; and the clerk should subscribe under it the term when the first writ issued. *Reg. Tr.* 1636.

and made re-
turnable in
term.
Bill of Middle-
sex or latitat on
day certain;

As writs are tested, so must they be made returnable in term; otherwise, void. *Mills v. Bond*, Str. 399.

A bill of Middlesex or latitat, with their respective aliases, &c. must be returnable upon a day *certain* or particular return, not on a general return day. *Vid. ante*, Ch. I. (C).

which may be
the next day
after it is sued
out.

There are no certain number of days in which the return must be made: a bill of Middlesex or latitat may be returnable the next day after it is sued out. *Loving v. Avery*, Str. 917. Nay, even the very same day it is issued. *Oxlade v. Davidson*, 4 D. & E. 610. Though the case of *Green v. Rivet*, Ld. Ray. 772, is expressly contrary, saying that the process is *de die in diem*; and it certainly seems hard, as the very day a debt is incurred, a writ may be sued out, made returnable, and a declaration delivered *de bene esse* without an opportunity for defendant to pay the debt. *Imp.* 6 edit. 135.

Capias ought
strictly to have
fifteen days be-
tween teste and
return, if not, it
is no irregular-
ity, but may be
amended.

In every *capias*, the proceedings being founded upon an original, the return should be made on a *general* return day; but if only a common *capias*, there need not be fifteen days between the teste and return. Formerly indeed, it was even held error if otherwise, and not merely an irregularity. *Williams v. Faulkner*, Bar. 409. Afterwards the court deemed it only an irregularity, and set aside the proceedings. *Atkinson v. Taylor*, 2 Wil. 117. The next step was, to allow the writ in such case to be amended. *Carty v. Ashley*, Black. 918. *Ib.* 3 Wil. 454.

And now, although there be not fifteen days between the teste and return, the court will not take notice thereof; nor even grant any thing upon a motion on that account, but allow it to be amended, as a matter of course. *Bourchier v. Whittle*, 1 H. Blac. 291.

It is to be observed, however, that this practice only relates to proceedings by *common capias quare clausum fregit*; which is a writ founded upon an original, supposed to be previously issued, and not to proceedings by *special original*. For which, see Chap. V.

When Process may issue.

In all process, in either court, a term must not intervene between the teste and return, as the cause would be then out of court, and the writ absolutely void; and if defendant were arrested thereon, an action of false imprisonment would lie against the plaintiff in the action, though not against the officer. *Parsons v. Lloyd*, Blac. 846. S. C. 3 Wil. 341.

Process bad, if a term intervene.

If it be tested in the wrong year of the reign, as the 31st instead of the 32d, it is irregular. *Taylor v. Nicholls*, Bar. 409.

Or if tested in a wrong year.

Formerly it was held necessary for the filazer to put his name to the *capias*; but there is now no occasion for it. *Frost v. Eyles*, 1 H. Blac. 120.

No need of filazer's name to *capias*.

(E. 4) Of subsequent and former Process, how they should agree.

(E. 4)

All *alias* and *pluries* writs should correspond with the first writ sued out; for if the *latitat* be against the defendant by one Christian name, and the *alias* by another, and the plaintiff afterwards proceed, the court will set aside the proceedings for irregularity. *Corbet v. Bates*, 3 D. & E. 660.

Subsequent and former process should agree.

(E. 5) Of the Time when Process may issue; its legal Operation as to being the Commencement of the Suit, and how it may be pleaded.

(E. 5)

Process may be sued out in vacation, but must be tested as of the preceding term. *Hart, assignee, v. Hingeston*, Bur. 2588.

When bill of Middlesex and *latitat*, &c. may issue; and whether to be considered as commencement of a suit, or as process. In common cases as process.

So a *latitat* may sometimes be issued before any cause of action has accrued; because, generally speaking, in all common cases, a *latitat*, by the practice of the court, is considered merely as a *process* or *summons*; and the declaration is deemed the commencement of the suit, and is what is meant by the exhibiting of the bill.

The time of issuing the *latitat*, therefore, is immaterial; for if any cause of action accrues at any time, *ante exhibitionem billæ*, by which must be here meant before the filing of the declaration, though, after the suing out of the process, it is sufficient. *Foster v. Bonner*, Cowp. 454. *Johnson v. Smith*, Bur. 950.

Time of issuing immaterial.

When Process may issue.

And this, although the writ was a bailable one, for the reason given by the court is, that the *ac etiam* clause says, "and also to answer to a bill to be filed." *Best v. Wilding*, 7 D. & E. 4.

This seems to be now the settled practice of the court, and Lord Mansfield's determination in *Foster and Bonner*, that the *exhibiting of the bill means the filing of the declaration*, has been since adhered to. But, with great deference, I conceive that the phrase *ante exhibitionem billæ* properly means the exhibiting or filing of the *original bill* or *bill in trespass*, formerly actually filed, and still supposed to be filed, to give jurisdiction to the court, and to warrant the issuing of the bill of Middlesex or *latitat*. Just as the original writ in the Common Pleas is still supposed to have issued, to warrant the process of the *capias*; and, indeed, Lord Mansfield's own reasoning in the above case bears me out in the position. In order to prove that the filing of the bill is the commencement of the suit, he says, "the form of pleading a tender of amends, or the statute of limitations, shews this; for, as in the Common Pleas, where the suit is by original, it is pleaded *ante impetrationem brevis*; so, in this court, it is said *ante exhibitionem billæ*. The bill, therefore, is considered as an original writ, and it is the first step on the record. The want of a bill, is the common error assigned as the want of an original is in the Common Pleas, and both are alike cured after verdict. If the plaintiff, therefore, duly proves a trespass or injury before the exhibiting of the bill, it is sufficient." All this I admit; but the question is, what bill is here alluded to? not surely the declaration; for how can that be considered as an original writ? Besides the common error assigned is never for want of a declaration. The very argument, therefore, I submit, proves the *exhibitio billæ* to be the exhibiting of the original bill or bill in trespass, which is in apposition to, in the nature of, and answers the same end as the original writ in the Common Pleas; and that, therefore, strictly speaking, whenever the exhibiting of the bill is termed the commencement of the suit, we ought surely to understand the filing of the original bill, which is still supposed to be filed; and the want of which was in all cases error, until the statute of Elizabeth, when it was cured after verdict; but for which, error still may be, and commonly is assigned after judgment by default.

When Process may issue.

But the above reasoning still holds stronger in cases of bailable process; for it has been generally allowed, that the *ac etiam* clause was introduced as a substitute for the original writ; and in many cases it has been declared to be as an original. *Moss and Birch*, 5 D. & E. 712.

But the original writ has been always deemed the commencement of the suit; why not, therefore, an *ac etiam writ*? nor does the reason given in the case of *Best and Wilding* appear perfectly satisfactory, viz. that the *ac etiam* clause is, "and also to a bill to be exhibited;" because it is to be remembered, that when this clause was first introduced into the process, (for which see the *Introduction*, sec. II.) it was merely to evade the statute 13 Car. 2.; and its operation was to bring the defendant into court upon a collateral charge to be exhibited against him, whilst the supposed offence for which he was arrested, and held to bail, was the *trespass* mentioned in the writ. It was upon this he was brought into court, and being once in court, he was then further to answer to the *civil* action to be exhibited against him, which was in fact a declaration by the bye. But now the practice is altered; and there can be no pretence that the defendant is arrested or held to bail for any other cause than that mentioned in the *ac etiam*; because, by 12 G. 1. c. 29. a positive affidavit is now required of the true cause of action, for which plaintiff is to be held to bail; which surely is an additional reason why all *ac etiam* writs upon which defendant has been held to bail should be deemed as original writs, and, therefore, as the commencement of the suit, and not be issued before the cause of action has actually accrued; and this the rather, because it has been determined, that an *attachment of privilege* ought not to bear date before the cause of action, on the ground of its being in the nature of an original. *Jones v. Burnet*, cited Burr. 967.

But although bailable process may be sued out, the defendant must not be arrested before cause of action has accrued. *Hanway v. Merry*, Vent. 28. Bur. 967.

And moreover, in all cases, even of process not bailable, when sued out before cause of action, it will not be good, unless the cause of action afterwards accrues before the time when the declaration ought in strictness to be filed; that is to say, in the course of the term when the process was returnable.

When Process may issue.

Which ought to be same term writ is returnable.

By the practice of the courts, indeed, the plaintiff may declare at any time within the second term after the writ is returnable; but that is merely an indulgence, and the declaration must still be intitled *as of the term when the process was returnable*. Therefore, if process be sued out, and no cause of action accrue until *after* the term when the writ is returnable, although before the expiration of the time allowed for plaintiff to declare in, and before he actually has declared, it will be of no avail; nor will plaintiff be assisted by intitling the declaration of the subsequent term. *Smith v. Muller*, 3 D. & E. 624.

In many cases latitat considered the commencement of a suit.

There are various cases, however, in which the latitat is not to be taken as mere process, but as the commencement of the suit; and these are, *whenever the actual time of suing out the writ is material, and the justice of the case requires that it should be precisely ascertained*.

Where the time of suing out writ is material; as in cases of penal actions, tenders, statutes of limitations, and the like.

As in penal and all other actions, where a limited time is fixed for the commencement of the suit, and which time expires in a vacation, if a latitat be sued out in that vacation, though long after such time has expired; yet, by being *tested* as of the preceding term, it would appear as if it had issued in due time. So it might be with the statutes of limitations.

The exact time of issuing it may be shewn;

In like manner a tender, made in *vacation*, and, in fact, before any action brought, if a writ were sued out in that vacation, would appear by the teste of the writ, being of the preceding term, to have been made after the bringing of the action. Again, if two actions be brought against defendant for the same offence, it may be material to shew the priority of one of the actions. Many other instances may be adduced of the like kind; but it is sufficient to say, that in the above, and in all other cases where the merits of the cause turn upon the exact time when the writ was sued out, that exact time may be shewn in the pleadings, or sometimes given in evidence, contrary to the teste of the writ, though a matter of record, for *factio cedit veritati*; and although the fiction cannot be contradicted, so as to invalidate the writ, yet it may for the purpose of establishing truth and administering justice.

And defendant may do this as well as plaintiff.

In all such cases the defendant is entitled, as well as the plaintiff, to shew the true time of the writ issuing, if it be to his advantage so to do. The leading cases on this head, and in which the whole of the above doctrine may be found, are, *Johnson v. Smith*, Bur. 950. *Foster v. Bonner*,

When Procefs may issue.

Bonner, Cowp. 454. *Wood v. Newton*, 1 Wil. 141. *Morris v. Pugh*, Bur. 1241. *Combe v. Pitt*, Bur. 1423. *Mostyn v. Fabrigas*, Cowp. 178.

Which doctrine equally applies to the *capias* in the Common Pleas. Doug. 62. N. *Leader v. Moxon*, 2 Black. 924.

When an action must be brought within a limited time, it is sufficient for the plaintiff to prove a writ sued out within such time, and a declaration within a year afterwards, without shewing such writ to have been either served or returned.

But where two writs, as a *latitat* and an *alias*, were given in evidence, and it was necessary, in order to save the time, to shew that the second writ on which plaintiff had declared, was a continuation of the first writ; in such case, it is necessary to shew the return of the first in order to warrant the issuing of the *alias* writ. *Parsons v. King*, 7 D. & E. 6. *Harris v. Woolford*, 6 D. & E. 617.

As it is now settled that a *latitat* may be sued out in the first instance; so it may be pleaded as in a replication to statute of limitations and the like, without shewing any bill of Middlesex. *Hollister v. Coulson*, Str. 550. *Johnson v. Smith*, Bur. 961.

In like manner it is sufficient to shew a *capias* in C. B. which every body understands to be now the commencement of a suit there; and that the court always intends that an original has regularly issued, whereupon the *capias* is grounded, so that the *capias* is deemed sufficient evidence of such original. *Leader v. Moxon*, Black. 925.

The want of an original bill, or original writ, is cured after verdict. *Foster v. Bonner*, Cowp. 455. And although by the statute, 4 Ann. c. 16. they are still necessary in case of judgment by default; yet, if error be brought, they may be afterwards obtained to support the judgment.

Formerly much delay and expence were occasioned by defendants craving *oyer* of the original writ, in order to set it out upon the record, and plead any variance, omission, or the like; but this practice is now wholly discontinued, and it is a settled rule in both courts, that if defendant craves *oyer* of the writ, no notice need be taken thereof, but plaintiff may sign judgment as for want of a plea. *Boats v. Edwards*, Do. 227. B. R. *Ford v. Burnham*, Bar. 340. C. B.

The above doctrine equally applies to the *capias*.

The return of writ when necessary to be proved.

Of pleading the *latitat*, &c.

No occasion to shew original bill or original writ.

Want thereof cured after verdict, though not after judgment by default.

Craving *oyer* of original not allowed.

SECTION II.

Of the Service of Copy of Process on Defendant.

Of the service
of the process.

IT has already been shewn, in the beginning of this Chapter, that, by the 12 G. 1. c. 29. whenever the cause of action does not amount to 10l. or if it does, and plaintiff makes no affidavit thereof, a copy of the process must be served *personally* upon the defendant; the form, nature, and effects of which process has also been fully treated of; it therefore only remains, in this place, to consider.

(A)

(A) What shall be deemed a good and effectual Service according to the Statute; and herein,

(A. 1) Of the Copy of Process to be served.

(A. 2) The Person by whom it is to be served.

(A. 3) The Manner in which it is to be served.

(A. 4) The Time when it is to be served.

(A. 5) The Place where it is to be served.

(A. 6) In case the Process be against several Defendants, or against Husband and Wife.

(A. 7) Of the Punishment of Defendant, if he treats Process with Contempt.

(A. 1)

(A. 1) Of the Copy of Process to be served.

Of the copy of
the process.

A complete and true copy of the whole process must be served. *Cutliff v. Standish*, Prac. R. 354.

How, if by ori-
ginal.

If the proceedings be by original, a copy of the *capias* upon the original, and not of the original itself, must be served. *Smith v. Anderton*, Prac. R. 342. *Peter v. Reigner*, ib. S. C. Bar. 410.

How, if in
cinque ports.

If defendant be served within the *cinque ports*, it should be with a copy of process, properly directed to the constable of Dover Castle. *Bax v. Culmor*, Bar. 422.

How in county
palatine.

If defendant be served in a *county palatine*, it must be with a copy of the process out of the original court, and not

Of the Service of Process.

not with a copy of the mandate. *Byers v. Whitaker*, Prac. R. 344. S. C. Bar. 406. Though before held contrary in *Beach and Smith*, Prac. R. 343. But in all these kind of cases, the general rule is, that a copy of the process, out of the *superior* court, must be served.

(A. 2) The Person by whom it is served.

(A. 2)

It is not necessary that the process be served by a sheriff's officer; if by the attorney, or his clerk, it is sufficient. *Delafield v. Jones*, Prac. R. 345.

By whom process is to be served.

But by the 5 G. 2. c. 27. s. 3. in particular franchises and jurisdictions, the proper officer there must execute the process. County palatines, however, have been held not within this act, which has been construed to extend only to particular liberties in counties. *Griffin & Alcock*, 2 Barn. 399.

If in particular franchises; what deemed such.

In these particular liberties, the process should be served by the bailiff, or officer belonging thereto; but if it be served by an improper person, the court will not set aside the proceedings, though the party will be liable to an action. *Hall v. Wilby*, Bar. 404. S. C. Prac. R. 345.

The consequence of being served improperly in a liberty.

But, in all cases, the person who serves the process should be able to read, so as to swear, if necessary, that he served a true copy; for where service was made by a bailiff who could neither write nor read, it was held bad. *Delafield v. Jones*, Cas. Prac. in C. B. 34.

Person serving process should be able to read.

(A. 3) The Manner in which it is to be served.

(A. 3)

The defendant, by the statute, is to be *personally* served.

Process is to be served personally. Need not shew the writ,

There is no occasion to shew the writ itself at the time of service; for the act only requires defendant to be served with a copy, which is the same as if it had been said, *deliver a copy*. *Worley v. Glover*, Str. 877. B. R. *Penchand v. Woolley*, Bar. 302. S. C. Prac. R. 353. *Boswell v. Roberts*, Bar. 422. But if defendant should demand a sight of the writ, it seems necessary to shew it. *Edgar & Farmer*, Cas. temp. Hard. 138. Nor is there any necessity to read it over; but if defendant refuse to take it, upon its being tendered, and it is left at his house, it will be sufficient. *Wood v. Dodgson*, Bar. 278. Or if sent inclosed in a letter, and defendant opens the letter and takes out the copy. *Boswell v. Roberts*, Bar. 422. Or if it be put through the crevice of a door to defendant,

unless requested; nor read it over, If left at his house, or sent in a letter, or put through the door, it is good.

PROCESS IN ACTIONS [Ch. III. (A. 3)]

Of the Service of Process.

ant, who had locked himself in, the nature thereof being at the same time explained to him. *Smith v. Wintle*, Bar. 405. S. C. Prac. R. 354.

(A. 4)

(A. 4) The Time when it is to be served.

The time when it is to be served.

Service of a latitat at eight o'clock in the evening of the day when it was returnable, held good; and this, although the declaration be left in the office in the course of the same day. *Robertson v. Douglas*, 1 D. & E. 191. *Mathews v. Partridge*, Prac. R. 352.

In one case it was held good service at eleven, on the night of the return day. *Webburn & Neale*, cited in Bur. 813.

It may be upon return day,

And it is now settled (notwithstanding the practice was otherwise formerly, as appears from Bar. 415. 424.) that service of process upon the return day thereof, is regular in both courts. In B. R. *Maud v. Barnard*, Bur. 813. In C. B. 2 Wil. 372.; and this, although it be notoriously after the rising of the court. *Ib.*

though the court is up,

but not before the date thereof; nor after the return;

Service of process on a day *previous* to the date of the process is bad. *Humphreys v. Mitchell*, Bar. 408.

So if it be after the date of the return, *Whale v. Fuller*, 1 H. Blac. 222. For if defendant cannot be served before the return of process, plaintiff should sue out fresh process. *Smith v. Muller*, 3 D. & E. 627.

nor when defendant is attending the court.

Process must not be served when defendant is attending the court upon any cause in which he is concerned; as it will be deemed a contempt of the court in the attorney who serves it. *Cole v. Hawkins*, Str. 1094.

(A. 5)

(A. 5) The Places where it is to be served.

For this, see *ante*, this Chapter, sec. I. (E. 1).

(A. 6)

(A. 6) In case the Process be against several Defendants, or against Husband and Wife.

How, if process be against several defendants.

If the process be against several defendants, you must name them all in the notice, and in the copy of the process. *Cutliff v. Standish*, Prac. R. 354. And every one must be *served*; for if any one of them cannot be served before the return, fresh process must be sued out (*Smith v. Muller*, 3 D. & E. 627.), unless plaintiff proceeded by *special* original; and then he may go on to outlaw such as could not be met with. *Worley v. Bull*, Prac. R. 351.

Of the Service of Process.

But until all the defendants be either served or outlawed, plaintiff cannot proceed.

All must be named and served.

If process be against husband and wife, service on the husband is sufficient for both; and if he does not appear for himself and wife, plaintiff may, on affidavit, enter an appearance for both. *Collins v. Shapland and Wife*, Bar. 412. *Buncomb v. Love & Ux.* Ib. 406. S. C. Prac. R. 351.

How, if against husband and wife.

(A. 7) Of Punishment of Defendant if he treats Process with Contempt.

(A. 7)

If at the time of service defendant speaks contemptuous words of the *court*, or of the *process*, an attachment will, on motion, be awarded against him: in the first case even without a rule to shew cause, but not so in the last. *Rex v. Kendrick*, Say. 114. *Semb. cont. Rex v. Jones*, Str. 185. Yet quere, whether, in the first case, without shewing cause, if upon the affidavit of one person only. *North v. Wiggins*, Str. 1068.

Defendant must not treat process with contempt.

SECTION III.

Of Defendant's Appearance according to Process.

WHEN the defendant has been regularly served with a copy of the process, it is his duty to appear in obedience thereto. This appearance was formerly in person, and entry was accordingly made, that the defendant *obtulit se in propria personâ*; but it is now the practice to appear by attorney, which appearance is effected in K. B. by what is called *filing common bail*, and in C. B. by *entering an appearance*; for the origin and reason of which, see the *Introduction*, sec. V.; and this appearance is necessary in all cases, because the defendant must be in court before his attorney can plead, or take any steps on his behalf, or plaintiff can proceed against him, except by declaring *de bene esse*, or conditionally; for which, see *post*, Chap. VI.

Formerly in person.

Now by attorney.

What it is.

In treating of this head, we will briefly consider,

(A) How Defendant is to appear in the respective Courts.

(B) Who may appear by Attorney.

(C) When

PROCESS IN ACTIONS [Ch. III. (A)]

Of filing Common Bail,

(C) When Attornies are bound to appear for Defendant.

(D) Of the Time of Appearance.

(E) Of Appearance in Actions against Husband and Wife.

(F) Whether Defendant is liable to a Penalty for not appearing.

(A) (A) How Defendant is to appear in the respective Courts.

How to file
common bail
and enter an
appearance.

First get a memorandum, or minute of warrant, to defend, on a 2s. 6d. stamp, agreeable to statute 25 G. 3. c. 80. and in the form therein prescribed; for which see ante, Ch. I. sec. II. (C); then proceed in the manner following:

*In B. R.**By filing Common Bail.*

Get a common bail piece, which may be bought at any law stationers, and is a piece of parchment in the following shape, stamped with a treble sixpenny stamp; fill it up with the name of the parties, &c. as thus;

Hilary Term, in the 37th year of
king Geo. 3d.

Middlesex, to wit:—James Davis
having been served with process, is
delivered to bail.

To John Doe, of
Westminster,
yeoman,

If filed ac-
cording to
statute, in-
sert these
words, filed
according to
statute.

and
Richard Roe, of
same place,
gentleman.

At the suit of
Joseph Sims.

Thomas Smith,
attorney for
defendant.

Carry this with the memoran-
dum to the clerk of the common
bails, in King's Bench Office, to
be filed; for filing pay, if in
term,

*In C. B.**By entering Appearance.*

A common appearance is writ-
ten on a piece of unstamped paper
in the following form:

Middlesex. Appearance for
James Davis, late of, &c. hosier,
(as named in the writ,) at the
suit of Joseph Sims, to a capias
returnable on the morrow of All
Souls.

T. S. attorney.

Carry this to the filaxer of
the county, in which process was
sued out, who enters it in a book
kept for that purpose.

At the filaxer's pay 2s. 6d.
(viz. 1s. 6d. for duty, and 1s.
for entry,) if one defendant. If
several sued jointly, pay 2s. 6d.
for first defendant, and 4d. for
each of the others. If sued se-
parately, 2s. 6d. each defend-
ant.

The warrant or memorandum
above mentioned is to be filed
with it.

Where the proceedings are by
bill (as against attorneys, &c.)
appearance is then entered with
the prothonotary.

(B) Who

and entering an Appearance.

term, or within six days after it. 15. 2d. If after that time, 4d. more for a post terminum.

There is no further post term incurred till the vacation of subsequent term after writ is returnable. The warrant or memorandum above-mentioned must be filed with it.

For every judgment by default, or non sum informatus or cognovit, bail should be filed for the defendant to warrant such judgment. Hil. 1 W. & M. Trin. 4 W. & M.

And also a memorandum of warrant.

By rule, East. 30 G. 3. the clerk of the bails of this court must mark the bail pieces numerically as they are received.

(B) Who may appear by Attorney.

(B)

All persons may now appear by attorney, except those who are presumed to want sufficient legal discretion to appoint one; such as *infants*, *ideots*, and *feme covert*s; the first of whom must appear by guardian, and the two last in person; and if they should appear by attorney, it would be error upon the record. *Milner v. Milner*, 3 D. & E. 629.; where other cases are cited.

All persons, except infants, &c.

(C) When Attornies are bound to appear for Defendant.

(C)

If an attorney undertake to appear for defendant, the court will compel him to do so at all events, even though he were imposed upon when he made the undertaking. *Lorymer v. Hollister*, Str. 693. And he must appear in a proper manner, agreeable to the situation of the defendant; thus, if he be an infant, the appearance must be by guardian, and the like. *Stratton v. Burgis*, Str. 114.

Must at all events, if he undertake so to do.

Should he refuse to appear, agreeable to his undertaking, an attachment will be awarded. Hil. 22 Car. 1.

An attorney had given the common undertaking to put in bail for defendant, or pay debt and costs. No bail being

Of filing Common Bail,

being put in, court was moved for a rule to shew cause why the master should not tax costs, and the attorney pay debt and costs. But on cause shewn, the court having consulted with the master, said the motion was premature; for that plaintiff should have got an appointment from the master, and taxed the costs, and then moved for an attachment. So the rule was discharged with costs. Mich. Term, K. B. 1794.

This undertaking must be in writing.

But Q.

Must appear, if he accepts declaration, unless accepted conditionally.

To appear for no more than retain him.

Defendant cannot revoke any retainer;

nor change his attorney without leave.

When attorney appears, court looks no further.

But this undertaking must be an express undertaking to appear (*Power v. Jones*, Str. 445.); and it is said that it must be in writing, and even signed by the attorney. *Left*, 192. But Q. Whether the Court, on motion, would not compel an appearance on a parol undertaking?

If defendant's attorney receives a declaration against his client from plaintiff's attorney, this acceptance obliges the attorney to appear, unless it was accepted conditionally in case his client should approve of it; for then, if he soon afterwards return the declaration, he will not be compelled to plead thereto. 1 Lil. Reg. 102.

If there be several defendants in one declaration, an attorney is not to appear for more than those by whom he is retained. Pas. 24 Car. B. R. 1 Lil. Reg. 102.

If a defendant properly authorises an attorney to appear for him, though he should afterwards revoke it, yet the court will compel the attorney to appear; for the party shall not have it in his power to cause any delay by such countermand. Trin. 22 Car. 1. B. R. Mich. 1654, C. B.

Nor can any one change his attorney in any cause pending, without leave of the court. *Powel v. Little*, Black. 8. *Macpherson v. Rorison*, Doug. 217.

If an attorney take upon himself to appear, the court looks no further, but proceeds, as if he had sufficient authority so to do, and leaves the party to his action against him, should it be otherwise. Anon, Salk. 87.

When an attorney has given such undertaking, and has rendered himself liable to an attachment by not observing it, court will not discharge the attorney from it by putting plaintiff in the same situation, or the like, upon the principle of assignment of bail-bond, or attachment against sheriff. Mich. Term 1794.

and entering an Appearance.

(D) Of the Time of appearing.

(D)

By the statute, 5 G. 2. c. 27. common bail must be filed, or an appearance entered, on the return of the process, or within eight days after.

Within eight days from return.

These eight days are to be reckoned in both courts, from the actual return day mentioned in the process, and not the *quarto die post*; and they are *exclusive* of the day of the return; i. e. if the process be returnable on the 6th, common bail should be filed, or appearance entered, on or before the 14th (*Bosanquet v. Rundo*, Bar. 245. S. C. Prac. R. 33.), unless the 14th fall on a Sunday; in which case defendant has all the next day to appear in. *Shadwell v. Angel*, Bur. 56.

Reckoned exclusive of return day;

nor counting Sunday, if the last;

Common bail must be filed, and appearance entered as of the term writ is returnable, otherwise the cause will be out of court, and proceedings set aside. *Edgar v. Farmer*, Cas. temp. Hard. 138.

If defendant's attorney hath neglected to file common bail in time, let him search and see if it has been filed by plaintiff's attorney; for, if not, he may still file it for defendant, though after the time directed by statute, provided it be within the next term after writ is returnable, and filed as of the *same* term writ is returnable. *Smith v. Painter*, 2 D. & E. 720.

but may be filed afterwards, if not done by plaintiff's attorney;

Of which same term he ought also to plead; and where there are two defendants, and one does not appear in the same term, he must plead *as* of the term when he ought to have appeared. 3 D. & E. 627.

Defendant may appear even before the return of the writ; for the appearance is to the suit not to the process. *Wynne v. Wynne*, 1 Wil. 39. Or if the writ be returned, not served. *Moor v. Watts*, Ray. 616. Or even before any writ be sued out; but to make such last appearance effectual, plaintiff must sue out process within fourteen days afterwards. Trin. 4 W. & M. B. R.

defendant may appear before the return,

or before writ sued out.

(E) Of Appearance in Actions against Husband and Wife.

(E)

If a man and his wife be sued, the husband must appear for both; and if he fail so to do, plaintiff may enter an appearance for them.

The

Of filing Common Bail, &c.

Husband must
appear for both.

The case of *Clark v. Norris and Wife*, as reported in 1 H. Blac. 235. is indeed otherwise, and *seems* to have decided, that where the defendant is joined with his wife in the writ, he may enter an appearance for himself only; but I rather imagine that there were circumstances in this case (not reported) warranting this decision: *Norris*, the defendant, as I was informed, was in fact a single man; but plaintiff conceiving him to be married to the woman who had contracted the debt, sued him as a married man jointly with his *supposed* wife; upon which he only entered an appearance for himself, which was clearly proper; plaintiff, therefore, having signed judgment for want of his appearing for the wife also, and defendant's reason for not so doing being explained to the court, the judgment was held irregular; so that this determination by no means affects the general point of practice, that the *husband*, when jointly sued with his wife, ought to appear for both.

If wife appear
without him, it
is not void; but
plaintiff cannot
proceed.

But if a wife appear without her husband, such appearance is not void in law (*Traverse v. Buckley & Un.* 1 Wil. 264.); though plaintiff cannot proceed without bringing the husband into court.

But see *ante*, Chap. II. sec. II. (B. 2), in what cases *feme coverts* may be sued without their husbands: and also *Partridge v. Clarke*, 5 D. & E. 194.

(F) Whether liable to any Penalty for not appearing.

By the 9 & 10 W. 3. c. 25. s. 33. if defendant did not file common bail, and enter an appearance in eight days, he was liable *immediately* to a penalty of 5l. This was by way of compulsion upon defendant to appear, and it was a rule absolute in the first instance. See 5 Mod. 392. Gilb. B. R. 369. *White v. Holland*, Str. 737.; but afterwards by 12 G. 1. c. 29. the time was altered to *four* days, and plaintiff was authorised to appear for defendant in case of his default; and by the 5 G. 2. c. 27. the time was again enlarged to eight days; it is doubted, therefore, in *Bac. Abridg.* 214. whether the clause in 9 & 10 Wil. is not virtually repealed by the latter statutes: now, if it were not repealed by 12 G. 1. c. 29. it does not seem to have been so by 5 G. 2. c. 27. which is merely explanatory of the former; but it does not appear to have been repealed by 12 G. 1. because the case

Of Plaintiff's appearing according to Statute.

case of *White and Holland*, Str. 737. was decided since that period; it rather seems, therefore, as if the legislature intended the latter statutes as an additional remedy to plaintiff, and that still the penalty might be enforced. But Q

SECTION IV.

Of Plaintiff's appearing for Defendant according to Statute.

It has been just observed, that before the statute 12 G. 1. c. 29. the only compulsion upon defendant to appear according to the process, was the penalty of 5l. in case of his default, inflicted by statute 9 & 10 W. 3.; for no one could enter such appearance but himself or his attorney. But by the 12 G. 1. c. 29. and the 5 G. 2. c. 27. it is enacted, that in case defendant shall not appear within eight days after the return of such writ or process, the plaintiff, upon making and filing an affidavit of the personal service of such writ or process, may file common bail, or enter an appearance for such defendant, and proceed thereon, as if such defendant had duly appeared himself.

By what statutes such appearance authorized.

We will, therefore, consider,

(A) How Plaintiff is to appear for Defendant according to Statute.

(B) When Plaintiff is to appear.

(A) How Plaintiff is to appear for Defendant according to Statute.

(A)

At the expiration of the eight days, let plaintiff's attorney search in the proper office to see if defendant has appeared himself: if not, a proper affidavit must then be made by the person who served the process; which, by the 5 G. 2. c. 27. may be sworn before any judge or commissioner of the court out of which the process issued, authorised to take affidavits in such courts; or before the proper officer for entering the common appearance in such court, or his deputy; but in town it is generally sworn before the clerk of common bails, if in B. R.; or the filazer, if in C. B.; or their respective deputies.

The affidavit having been made and sworn, plaintiff's attorney may then file common bail, or enter an appearance.

PROCESS IN ACTIONS [Ch. IV. (A)]

Of Plaintiff's appearing according to Statute.

In which case the same form of common bail-piece, or appearance, will do, as mentioned in the last section, only add therein the words, "filed according to the statute," agreeable to rule of court Mic. 10 G.

Form of affidavit.

The affidavit is to be filed gratis, and is to the following effect:
A. B. of, &c. clerk to T. S. attorney for the above-named plaintiff, maketh oath, and saith, that he did, on the day of instant, personally serve the above defendant with a true copy of (a writ of *capias ad respondendum*, if in C. B.; or bill of *Middlesex* or *latitat*, if in B. R.) which appeared to this deponent to be regularly issued out of this honourable court, and returnable on ; under which said copy was written an English notice to the said defendant of the intent of such service, pursuant to the statute in such case.

Sworn, &c.

A. B.

No memorandum, or warrant, is required in this case. *Vide ante*, Ch. I. Sec. II. (C).

When the suit is by original in B. R. an appearance is entered with the filazer in the same manner as an appearance in C. B.; and the affidavit of service, when by original, is like the above, only specifying the writ, and where returnable.

The affidavit ought not to be sworn before any attorney in the cause.

The kind of writ must be described in it; the affidavit of service of a writ of *mesne* process only held bad, *Lakin v. Dewall*, East. Term 25 G. 3., and judgment set aside, and defendant discharged, though in execution, on this objection only.

This affidavit may be sworn in the Common Pleas before any Commissioner, although he be plaintiff's attorney. R. East. 15 Geo. 2.

(B)

(B) When Plaintiff is to appear.

Not till the ninth day after return;

nor after declaration, unless delivered *de bene esse*;

nor after the next term from return.

Plaintiff cannot appear for defendant before the 9th day, *exclusive* after the return of the process; *i. e.* if process be returnable on the 6th, not till the 15th. *Morse v. Farnham*, Prac. R. 32. Nor after a declaration delivered, if it be delivered in *chief*. *Wrath v. Bristow*, Prac. R. 31. *Smith v. Painter*, 2 D. & E. 719. But plaintiff may deliver a declaration against defendant *de bene esse*, or conditionally before the time for his appearing has elapsed, and afterwards file common bail in case he does not appear in time.

Plaintiff must file common bail according to the statute, either in the term when the writ is returnable, or in the term following; and he cannot do it afterwards.

Smith

Of Defects and Irregularities in Process.

Smith v. Painter, 2 D. & E. 720. And in the latter case he should intitle the bail piece *as of* the term writ was returnable. But if the defendant has given a *cognovit*, he is estopped from objecting to the irregularity, if before the time of making such objection plaintiff has filed common bail *nunc pro nunc*. *Davis v. Hughes*, 7 D. & E. 206.

Where plaintiff files common bail for defendant on any day between the 2d and 6th November, and he is in other respects entitled to sign judgment, it is signed as on the day preceding the effoin day of Mich. Term, *Wansley v. More*, 5 D. & E. 65.

Plaintiff must appear for defendant in the same name that he sued him in the process. *Doo v. Butcher*, 3 D. & E. 611.

SECTION V.

Of Defects and Irregularities in Process.

- (A) How far the Courts will amend Process.
- (B) How Defects or Irregularities cured.
- (C) How and when to be taken Advantage of.

- (A) How far the Courts will amend Process. (A)

The courts of King's Bench and Common Pleas cannot amend an *original* writ, because it issues out of the court of Chancery: besides, there is nothing to amend by; and if it be once executed, though improperly, it cannot afterwards be used, but must be superseded. *Ogier v. Hayward*, Bar. 417. *Carter v. Ashley*, 3 Wil. 454. But *mesne* process, and also an attachment of privilege, which is in the nature of an original, the law courts may amend. *Ib.*

Courts cannot amend originals;

but may *mesne* process.

A little matter will be deemed sufficient to amend by: thus, a bill of Middlesex indorsed and filed of record as of the 24 G. 3. was ordered to be taken off the record, and amended according to the truth of the fact, and recorded again as of Hil. Term 25 G. 3.; and the court held, that the *præcipe* to the officer was sufficient to amend by. *Green v. Rennet*, 1 D. & E. 782. And in the C. B. the court said, that when a plaintiff bespeaks a writ, returnable such a day, he *impliedly* orders the officer to make the teste regular; and by those *implied* instructions we may amend. *Carty v. Ashley*, Black. 918. See *ante*, Sec. I. (E. 6).

Any thing will do to amend by—

As the *præcipe*,

or even implied instructions.

PROCESS IN ACTIONS [Ch. III. (A)]

Of Defects and Irregularities in Process.

No error on
mesne process.

No error can be assigned on mesne process. *Ib.*

If therefore the process be in any respect defective as it cannot appear upon the face of the record by *oyer*, nor assigned for error, the only advantage to be taken thereof is, by motion to set aside the proceedings.

Appearance
may be amend-
ed.

The court will also amend the appearance. In the case of *Whetton v. Packman*, 3 Wil. 49. defendant was rightly named *John* in the *capias* and in the declaration; plaintiff's attorney made an affidavit of the service of the writ on the defendant by his right name, and then entered an appearance for him according to the statute by the name of *James* instead of *John*; it was moved to set aside declaration, defendant not being in court; but it was held by the court a mere slip, and they ordered the filazer to rectify the mistake.

(B)

(B) How Defects or Irregularities cured.

(B. 1) Whether by Defendant's Appearance.

(B. 2) Whether by Plaintiff's Appearance according to Statute.

(B. 3) Whether by accepting Declaration.

(B. 1)

(B. 1) Whether by Defendant's Appearance.

Defects in pro-
cess cured by
appearance,

Any error in *mesne* process is cured by the party's appearance, and he shall not afterwards take advantage of it; because the only intent of *mesne* process is to bring the defendant into court, and when he is come in, there is an end of the process; for defendant might have come in upon the writ without it. *Rex v. Hare*, Str. 155. *Wilson v. Finch*, Bar. 163. *Wade v. Wadman*, ib. 167.

Though defend-
ant was named
wrong therein.

If defendant be served with process by a wrong name, or addition, and appears by his right name, and plaintiff declares against him by his right name, the defect is cured, and the court will not set aside the proceedings for irregularity. *Hole v. Finch*, 2 Wil. 393. *Doo v. Butcher*, 3 D. & E. 611.

But there is a distinction between a *defect* in the proceedings and a mere irregularity; in the former case, the appearance does not cure it, as where the writ comprised two different defendants for different causes of action in bailable process, on which one was arrested, his putting in bail did not cure the defect. *Huffey v. Wilson*, 5 D. & E. 254.

(B. 2) Whe-

Of Defects and Irregularities in Process.

(B. 2) Whether by Plaintiff's Appearance according to Statute. (B. 2)

But although the appearance by defendant shall be deemed a waiver of such defects or irregularities; yet the plaintiff shall not be able to correct his own errors by appearing for defendant according to the statute. *Westall v. Finch*, Bar. 406. *Sed CONTRA, White v. Washington*, Prac. R. 348.

But not cured by plaintiff's appearing according to statute.

So that if process be sued against defendant by a wrong name, and plaintiff files common bail according to statute in defendant's right name, and then declares against him in his right name, this shall not be of avail; but proceedings will be set aside. *Doo v. Butcher*, 3 D. & E. 611.

(B. 3) Whether by accepting Declaration. (B. 3)

Whatever previous defect or irregularity there may have been in the *mesne* process, or the service thereof, such as want of notice to the copy of process, or a proper number of days between the teste and return, or a regular personal service of the process, or even if no common bail has been filed for defendant; yet if defendant, or the attorney generally concerned for him, accepts the declaration, or takes it out of the office, and pays for it, it is a complete waiver of any such defects or irregularities. *Morgan v. Luckup*, Cas. temp. Hard. 242.

Accepting declaration will cure defects.

So although plaintiff filed common bail for defendant according to statute; yet any defect in the process shall be cured by defendant's taking declaration out of office. *Caswall v. Martin*, Str. 1072. *Marquand v. Mayor of Boston*, Bar 416.

Though bail was filed according to statute.

(C) How and when Defects or Irregularities to be taken Advantage of. (C)

The proper way of taking advantage of any defects in process or irregularities in the service thereof, or the like, is by motion in court to stay proceedings. — But if the error be in the process, it must be first returned, and brought before the court, before any advantage can be taken thereof. 3 Wil. 58. *Perrott, one, &c. vs. Hele*.

By motion;

But process must first be returned.

The time of taking advantage of any irregularity depends upon the nature of the defect, whether it be such as vitiates the proceedings *in toto*, so as to render them null

This depends upon the nature of the defect.

Of Defects and Irregularities in Process.

and void; or only such an irregularity, which may be cured or waived by some subsequent act of the parties; for there is a distinction between a defect in the proceedings and a mere irregularity. *Hussey v. Wilson*, 5 D. & E. 254.

If process void,
at any time.

Thus, if plaintiff's name be omitted in a writ, defendant may at any time apply to set aside proceedings, for it is as no process. *Thompson v. Brew*, And. 16. So where the affidavit of personal service was defective, proceedings were set aside, though defendant was in execution. *Vid. ante*, p. 98.

So where the affidavit and writ comprised two different defendants for different actions, viz. the maker and indorser of a note, it was held a defect, and not a mere irregularity; and therefore not cured by defendant putting in bail. *Hussey v. Wilson*, 5 D. & E. 254.

If only irregular,
before judgment.

If the irregularity be in the notice subscribed to the copy of the process, the motion must be made before judgment signed; if in the notice of declaration, two days before the time appointed for the execution of the writ of inquiry. *Grimes v. Cleaver*, Bar. 256.

And in general it seems, that all irregularities in the process, i. e. previous to the declaration, should be complained of before judgment signed. *Grimes v. Cleaver*, Bar. 256. *Morse v. Farnham*, Bar. 243. *Jemmett v. Voyer*, Bar. 296. Though it need not be till after notice of declaration given to defendant. S. C. Prac. R. 355.

But if defendant applies so soon as he has opportunity, though after judgment, court will set aside the proceedings. *Smith v. Painter*, 2 D. & E. 720.

If plaintiff enters an appearance for defendant before the expiration of the 8th day, and defendant has not himself appeared, but suffers plaintiff to proceed, he must complain of plaintiff's irregularity before judgment is signed, or it will be too late. *Morse v. Farnham*, Prac. R. 32.

If defendant complains of any irregularity in the process or notice, he must annex the copy to his affidavit, that it may appear to the court.

There are various cases in the books as to the time of making applications to set aside proceedings for irregularity; but the best and surest rule is, that they should be made in the first instance, the first opportunity that the party has to bring his complaint before the court, otherwise it will be received with suspicion; and if not made in a reasonable time, will be wholly refused.

CHAPTER IV.

Of the Proceedings in bailable Actions from the Commencement of the Suit to the Declaration.

HAVING fully treated of the PROCESS, that is to say, the means of compelling an appearance in actions not bailable, and shewn in what way the defendant himself is to appear, or the plaintiff appear for him, according to the statute, the next thing to be considered is the method of effecting this appearance in bailable actions; for after the defendant is once in court to answer the plaintiff's charge, the proceedings in both kind of actions are nearly similar.

The first step to be taken when the party is to be arrested, is the making of an *affidavit* by the plaintiff, of the true cause of action, which must be above 10l., agreeable to the statute 12 G. 1. c. 29. A writ is then taken out, directed to the proper sheriff of the city or county where the defendant is to be found; upon this a *warrant* is obtained, and the *arrest* made. When the party is taken, he must either be kept in custody, or must enter into a bail-bond to the sheriff, with two sureties, conditioned for his appearance on the return of the writ; this is called *bail below*, or *to the sheriff*. If he appears according to the exigency of the writ and the bail-bond, fresh security is required of him, who are to be bound for the payment of the debt and costs should plaintiff recover in the action, or that the defendant shall be rendered into custody. This is done by the defendant and his sureties entering into a recognizance in court to that effect, which is called *putting in bail to the action*, or *bail above*. But as the plaintiff can have no greater security or satisfaction than the body of the defendant, he may either render himself, or be rendered by his bail, which is termed *surrendering in discharge of bail*. It frequently however happens, that after the bail-bond to the sheriff has been entered into, the condition is broken, the defendant neither appearing on the return of the writ, nor any proper render of him being made; in which case there are two remedies, at the

Of the Affidavit to hold to Bail.

election of the plaintiff; he may either take an *assignment of the bail-bond*, and bring an action against the bail for the *penalty*, or he may *proceed against the sheriff by attachment* for his contempt of the court in not having the defendant before them, in obedience to their writ, and thus compel him to pay the debt and costs, who may for his own indemnity resort to the bail-bond.

Such is the general outline of the proceedings enforcing the appearance of defendants in bailable actions, or of obtaining redress in default thereof; we will consider them more fully under the following heads:

SEC. I. *Of the Affidavit to hold to Bail.*

SEC. II. *Of suing out the Writs, or Process.*

SEC. III. *Of the Warrant and Arrest.*

SEC. IV. *Of Bail to the Sheriff, or Bail below.*

SEC. V. *Of Bail to the Action, or Bail above.*

SEC. VI. *Of the Surrender in Discharge of Bail.*

SEC. VII. *Of the Assignment of the Bail-bond, and the Action thereon.*

SEC. VIII. *Of proceeding against the Sheriff by Attachment.*

SECTION I.

Of the Affidavit to hold to Bail.

Directed by stat.
12 G. 1.

This affidavit is particularly directed to be made by the 12 G. 1. c. 29. s. 1. which enacts, That in all cases where the plaintiff's cause of action shall amount to the sum of 10*l.* or upwards, affidavit shall be made, and filed of such cause of action; which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, authorized to take affidavits in such courts, or else before the officer who shall issue such process, or his deputy, which oath such officer or his deputy are thereby empowered to administer; and for such affidavit, one shilling, over and above the stamp duties, shall be paid, and no more.

How the law of arrests and bail was before this statute, has been shewn in the Introduction, sec. IV. and V.

We

Its Certainty.

We will now proceed to shew,

(A) The Degree of Certainty requisite in such Affidavit.

(B) By and before whom to be made.

(C) How to be stamped, and of joining several Defendants, or Causes of Action, in one Affidavit.

(D) Of the Title, Jurat, and Time of filing Affidavits.

(E) Of Counter and Supplemental Affidavits.

The statute only generally says, that an affidavit shall be made; but, in order to prevent oppression and evasion, various restrictions and regulations have been made by the courts respecting it; and particularly as to

(A) The Degree of Certainty requisite in such Affidavit with respect to

(A. 1) The actual Existence of the Debt.

(A. 2) The Description of the Cause of Action.

(A. 3) The Language in which it is drawn.

(A. 4) Exceptions as to Executors, Assignees, &c.

It is an invariable and regular rule, that the affidavit must be as *positive* as the nature of the case will admit, *Pomp v. Ludvigson*. Bur. 655. Where a variety of cases to the same point are cited. Also *Sheldon v. Baker*, 1 D. & E. 83.

Affidavit must be positive.

It must therefore expressly state, that *the defendant is indebted* to plaintiff without any thing being left to be collected by *inference*; for it must not be argumentative.

That plaintiff, on such a day, gave defendant notice to quit on, &c. and that he held over, by reason of which, and by force of the statute, an action has accrued to recover so much money; not sufficient, no positive debt being stated. *Wheeler v. Copeland*, 5 D. & E. 364.

So when a penalty was entered into to secure the payment of a balance of accounts, the exact balance must be sworn to, and that it is still unpaid. *Hatfield v. Linguard*, 6 D. & E. 217.

Whenever

Of the Affidavit to hold Bail.

Not by way of
reference.

Whenever an affidavit is only by way of *reference*, it is bad—as that defendant is indebted to A. B. in so much, as appears by the books and ledger of A. B. *Barclay v. Hunt*, Bur. 1995.; or as appears by a stated account attested by the Consul at Oporto, *Swarbreck v. Wheeler*, Bar. 100.; or, as appears by an affidavit made by the plaintiff in Amsterdam, which the deponent believed to be true, *Rios v. Belifante*, Str. 1209.; or upon a bond, as *thereby* may appear, *Heathcote v. Goslin*, Str. 1157.; or, as appears by the master's allocatur, *Powell v. Porterch*, 2 D. & E. 55.; or, as acceptor of a bill of exchange, as appears by the said bill, &c. *Rollin v. Mills*, 1 Wil. 279.; or, as appears by agreement dated such a day, *Jennings v. Martin*, Bur. 1447.; or, as appears by an account stated under defendant's own hand, *Anon.* 1 Wil. 121.; or, as appears by the confession of defendant, and by his promise to pay the same. *Kelly v. Devereux*, Say. 59.

Nor any words
of such tend-
ency.

So if the words be not strictly words of reference, yet if they be of the same tendency, leaving any thing to be collected therefrom, the affidavit will be bad; as, that defendant is indebted to plaintiff in 20l. and upwards, *according to the bill of this deponent delivered to defendant. Williams v. Jackson.* 3 D. & E. 575.

Because in all the above cases the debt is not positively sworn to, since although it may *appear* to be due by the books, or the bond, or the like, yet in fact it may have been paid and satisfied, and a separate receipt or discharge taken.

In one case held
otherwise, but
Q.

In one case, indeed, the affidavit was held sufficient, although the words were, that defendant was indebted to plaintiff in, &c. *as he computes it. Moulby v. Richardson*, Bur. 1032. But Q. Whether this would now be deemed sufficiently positive, and in the case of *Mackenzie and Mackenzie*, 1 D. & E. 717. Buller, Jus. doubted whether it had not been over-ruled.

Swearing to be-
lief bad.

Again: Swearing to belief is not, generally speaking, sufficient.

As where the affidavit made by the plaintiff's book-keeper was, that the defendant was indebted to plaintiff in so much, as the deponent verily believed. *Claphamson v. Bowman*, Str. 1226.

Though with
reference to ac-
counts.

Nor is swearing to belief sufficient, though with a reference to accounts sent from abroad where the debt arose. *Pomp v. Ludvigson*, Bur. 655. *Van Morsell v. Julian*, 1 Wil. 231.

But

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But if, from the nature of the case, the party can only have a ground of belief, and cannot make a direct assertion, it is otherwise.

As where a bond was given, conditioned for the payment of bills of exchange drawn in England on A. in the East Indies, in case such bills should be returned to England protested for non-payment, it is no objection to an affidavit to hold the obligor to bail, because, after stating that he was indebted to deponent in a certain sum; stating also the condition of the bond; it said, that the said bills were not paid to his knowledge or belief in India or elsewhere, but were still unpaid. *Hobson v. Campbell*, 1 H. Blac. 247.

The court of C. B. is not so strict with respect to the positiveness and certainty of the affidavit as the court of K. B. The former holding, that circumstances of the cause of action are sufficient without positively swearing to the debt. *Long v. Lynch*, 2 Black. 740, 3 Wils. 154. Whereas the latter always requires a positive oath of a subsisting debt.

For in B. R. the affidavit must further shew that it is a subsisting debt at the time of making the affidavit, and of suing out the writ. *Kelly v. Devereux*, 1 Will. 339.

The affidavit should therefore state, that the debt is still due; and if it does, it will be good, even although words of reference may be inserted, because it would be then rendered sufficiently positive.

It was for want of this that the affidavit of a debt, as appears by the master's *allocatur* above-mentioned, was held insufficient. *Powell v. Portherch*, 2 D. & E. 55. S. P. *Mackenzie v. Mackenzie*, 1 D. & E. 716. In which last case, Buller, J. mentioned an instance where affidavit was bad, although the words were, that defendant was indebted to plaintiff in 500*l.* for money had and received, and for which he has not accounted.

So an affidavit stating that defendant was indebted to plaintiff in 245*l.* for money lent by plaintiff to defendant for the use of another; and for which defendant promised to be accountable, and to repay, or cause to be secured to plaintiff, &c.; it not appearing in affidavit that the money had not been secured, it was held insufficient. *Jacks v. Pemberton*, 5 D. & E. 552.

It is upon this principle, that an old affidavit, made some time ago, is not sufficient, because the debt may have

Except from the nature of the case, the party cannot swear positively.

Court of C. B. not so strict as B. R.

In latter, affidavit must shew the debt to be subsisting,

at the time of suing out writ.

Of the Affidavit to hold to Bail.

have been since paid; and it must appear to be as before mentioned, not only a subsisting debt at the time of making the affidavit, but also of suing out the writ, *Collier v. Hogue*, Str. 1270.

(A. 2)

Affidavit must describe with certainty the cause of action, and shew how the debt arose.

(A. 2) Of the Description of the Cause of Action,

As the affidavit must be positive with respect to the actual existence of the debt, so it must be certain as to the description of the *cause of action*.

It must shew how the debt arose, and this, although the circumstances be long and complicated, and although the ground of the demand cannot be set forth, without stating the whole substance of the declaration. *Cope and another v. Cooke*, Do. 467.

An affidavit, therefore, that defendant was indebted to plaintiff in 500l. and upwards, *Cooke v. Dobree*, C. B. T. R. 10.; or, in so much upon promises; *Cope v. Cooke*, Do. 467; or in 23l. and upwards in trover. *Hubbard v. Pacheco*, C. B. T. R. 218, or that defendants (*Baron & Feme*), or one of them, was indebted for board, &c. provided for the wife. *Paris v. Stroud & Un*, Bar. 95.; and the like are not sufficiently certain and descriptive.

So an affidavit in trover for goods and chattels of 50l., leaving out the word *value*. *Philpot v. Harlow*, Mich. K. B. 1793.

How if on bond of indemnity.

So in actions on bonds, to save harmless, &c.; and in actions of covenant, the affidavit must state positively and certainly how, and for how much, plaintiff is damaged. *Whitfield v. Whitfield*, Bar. 109.

If on the lottery act.

An affidavit to hold to bail on the lottery act, 27 G. 3. c. 1. should specify the nature of the offence, and aver that defendant had incurred the forfeiture; but the offence need not be described circumstantially; nor is the plaintiff obliged to swear that defendant is indebted to him to the amount of the penalty; for as no person is entitled to the penalty till the process is actually sued out, it cannot be said to be a *debt* due to the plaintiff at the time of making the affidavit. *Davis v. Mazzinghi*, 1 D. & E. 705.

What a good affidavit in trover.

But an affidavit, that defendant is indebted to plaintiff in 103l. for goods which defendant converted to his own use; *Emerson v. Hawkins and others*, 1 Wil. 335.; or that the defendants have possessed themselves of divers goods belonging

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belonging to plaintiff, and have refused to deliver them up, and that they, or some of them, have converted and disposed of them to their own use; *Charter v. Jaques and others*, Cowp. 529. is sufficient to hold to bail in trover.

(A. 3) Of the Language in which Affidavit is drawn. (A. 3)

The affidavit must be clear, certain, and correct in the language in which it is drawn. It should be such an oath as a perjury can be assigned upon. Affidavit must be correct in the language.

The most trifling inaccuracy, or clerical mistake, therefore, will render it defective; as where an affidavit of debt was made, that defendant *in* indebted, instead of *is* indebted, the court held it defective, and as no affidavit, and discharged defendant on common bail; because a perjury could not be assigned upon it. *Reeks v. Groneman*, 2 Wil. 225. A clerical mistake will vitiate it;

So if the action be brought for a penalty in an act of parliament, if the act be misrecited in the affidavit, it will be bad; as calling it an act passed in the 27 G. 3. when it passed in the 22 G. 3. But the party is not bound to set forth the year at all when the act passed. *Watson v. Shaw*, 2 D. & E. 654. or if a statute be misrecited.

(A. 4) Exceptions as to Executors, Assignees, &c. (A. 4)

It has been already shewn that, generally speaking, the affidavit must be positive, nor will swearing to belief be alone sufficient; but there are some exceptions to this rule:—Thus in all cases where *executors, administrators, or assignees* make the affidavit, they are permitted to swear as to their *belief* only, which, from the nature of their respective situations, is as much as they can do. 1 D. & E. 717. *Touna v. Edward*, Bur. 2283. *Swayne v. Crammond*, 4 D. & E. 176. Executors, administrators, and assignees are exceptions to the above doctrine.

Thus where an assignee of a bond swore that the obligor was indebted in 90l. for principal and interest, as he *believed*, the court held it sufficient to hold to bail. *Louland v. Basset*, Trin. 16 Geo. 2.

But it is better for the obligee and assignee to join in the affidavit.

So if an executor swears to the books of the testator, and that he believes them to contain a true account, and that

They may swear to belief.
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that the debt is still unpaid; or if an assignee swears that the defendant is indebted, as appears to this deponent, by the last examination of the bankrupt, and as the deponent verily believes, and that he has not received the debt, or any part of it, and that he believes it to be still due, such affidavits are sufficient to hold to special bail. *Touna v. Edwards*, Bur. 2283. *Swayne v. Crammond*, 4 D. & E. 176.

But words of reference alone will not do.

But it is to be observed, that in all these cases, words of reference alone, such as *appears by the testator's or the bankrupt's books*, and the like, are not sufficient, unless followed up by the belief of the party who makes the affidavit. *Sheldon v. Baker*, 1 D. & E. 84. *Barclay and others, assignees, v. Hunt*, Bur. 1992. *Walrend v. Franksam*, Str. 1219. *Fludger, assignee of Jackson, v. Hughes*, 27 Geo. 2.

If there be three assignees of a bankrupt, one may make an affidavit, and hold to bail. *Swaine and others v. Crammond*, 4 D. & E. 176.

(B)

(B) By and before whom the Affidavit ought to be made.

Who may make the affidavit.

The affidavit may be made by plaintiff himself, or his wife, or servant, or any third person in his absence who knows of the debt being contracted, and can swear that it is still due.

Q Whether it must be made by a person competent to be a witness?

It is generally laid down, that it should be made by some person who is legally competent to be a witness. Tid. 39. So in *Nichols v. Dallybunt*, Bar. 79. where an affidavit, made by a pickpocket returned from transportation, was held insufficient, because no credit could be given to the affidavit. Yet in later cases, it has been held otherwise; and an affidavit made by a person convicted of perjury was deemed good; for it was said, that although plaintiff cannot be a witness, yet he must not be stripped of his legal remedy to recover his just debts. *Horsley v. Somers*, Bar. 116. *Davis v. Carter*, Sal. 461.

Affidavit by a third person must be that debt is subsisting.

Where the affidavit is made by a third person, it must be positive as to its being a subsisting debt; for an affidavit that the defendant is indebted to the plaintiff in a certain sum of money, as appears by a bottomry bond in the deponent's custody, and that the defendant, on such a day, acknowledged the debt to him, and promised to pay the same to the deponent, who has authority from the plaintiff by letter of attorney to receive the

same,

By and before whom to be made.

same, is not sufficiently positive. *Kelly v. Devereux*,
1 Wil. 339.

If the plaintiff, being in Scotland, wants to hold defendant to bail in England, he may go before a magistrate in Scotland, competent to administer an oath, and make affidavit in the presence of another person who is shortly coming to London; which person, upon his arrival in London, must also make affidavit that the former affidavit of the debt was made by the plaintiff; that the hand-writing subscribed thereto is his own hand-writing; that the said affidavit was made and taken before a magistrate, who, this deponent believes, had competent authority to administer an oath; and that the hand-writing subscribing said affidavit, is the hand-writing of such magistrate; on which several affidavits a judge makes an order to hold to bail.

If plaintiff living in Scotland, wants to hold defendant in England to bail, how he may do it.

By the act 12 G. 1. c. 29. affidavits to hold to bail are ordered to be made before any *judge or commissioner of the court*, out of which the process shall issue, authorised to take affidavits in such courts, or else before the *officer who shall issue such process, or his deputy*; which oath such officer or his deputy are thereby empowered to administer.

Before whom to be made.

The commissioners authorised to take affidavits mentioned in the above act, are those appointed by the judges, &c. by virtue of the statute 29 Car. 2. c. 5., which enacts, that the judge, &c. of the courts of Westminster, by commission, may empower persons in the several counties of England to take affidavits concerning matters depending in their several courts.

By rule of K. B. Easter 15 G. 2. in both courts affidavits to hold to bail may be sworn before any such commissioner, although he be concerned *as attorney for the plaintiff*.

It is to be observed, however, that by a late rule of K. B. 31 G. 3. whenever an affidavit is taken by any commissioner of the court, made by any person who, from his or her signature, appears to be *illiterate*, the commissioner taking such affidavit shall certify, or state, in the jurat, *that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same; and also that the said party wrote his or her signature in the presence of the commissioner taking the said affidavit.*

(G) How

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(C) How to be stamped, and of joining several Defendants, or Causes of Action, in one Affidavit.

The affidavit must be stamped with a two-shillings stamp.

It would therefore be an injury to the revenue if several causes of action were to be put into one affidavit, whether against one or different defendants; and it would also be a vexatious proceeding against the party, because he must take a copy of the whole affidavit, and would therefore pay for more than related to that particular cause of action against him. Besides which, the proceedings by affidavit and *ac etiam* writ were to supply the place of the original, in which only one cause of action could be comprised. For these reasons no affidavit must contain two different causes of action, whether by the same plaintiff against the same defendant, *Crooke v. Davis*, 5 Burr. 2690., or against several defendants for separate causes of action, *Gilby v. Lockyer*, Doug. 217. *Hussey v. Wilson* 5 D. & E. 254.; but there must be separate affidavits against each, *Goodwin qui tam v. Parry*, 4 D. & E. 577. *Holland v. Johnson*, id. 697. Nor can two plaintiffs for separate causes of action unite them in one affidavit against the same defendant. *Dean and Chapter of Exeter v. Seagell*, 6 D. & E. 688.

In all cases, therefore, one affidavit should only contain one cause of action.

But it may state several offences as to be included in that action, as for penalties forfeited by unlawful insurances with different persons. *Holland qui tam v. Bothmar*, 4 D. & E. 228.

(D.) Of the Title, Jurat, and Time of filing Affidavit.

Several cases have of late arisen respecting the propriety of intitling the affidavits to hold to bail. In East Term 1794, motions were made to set aside proceedings for want of titles to the affidavit; but the court held, that no title was necessary; that the affidavit to hold to bail is not strictly the commencement of a suit; that there is no cause then in court; and that such affidavit, therefore, need not be intitling in any cause. *Adams v.*

(D) Sec. I.] IN BAILABLE ACTIONS.

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and of Supplementary Affidavits.

Pinfold, K. B. East. 34 G. 3. and *Adams v. Ashfield*, in C. B. Imp. K. B. 122.

Afterwards, in the case of the *King qui tam v. Cole*, defendant was discharged on common bail, because affidavit ~~was~~ intitled. And at length, in order to settle the practice by rule of court, Trin. 37 G. 3. it is ordered, That affidavits to hold to bail *shall not be* intitled either as of any court, or with the names of any parties.

By a late rule of court, Mich. 37 G. 3. great strictness is required with respect to the jurats of affidavits, which orders, That upon every affidavit sworn in the court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavits shall be written in the jurat; and that no affidavit be read or made use of in any matter depending in this court, in the jurat of which there shall be any interlineation or erasure,

In the case of *Hussey v. Baskerville* in K. B. cited in *Reeks v. Groneman*, 2 Wil. 225. it is said that the affidavit must be filed with the proper officer before or at the time the writ is sued out.

But I doubt that, for although the statute directs the affidavit to be filed, it does not say *when*. It must surely be before the party can be arrested, but I conceive that the writ may be first sued out, and then the affidavit made as a justification to hold to bail. But when it is intended to arrest the party, it is better to make affidavit in the first instance.

(E) Of Counter and Supplementary Affidavits.

(E)

In the King's Bench, when a plaintiff has once sworn positively to his debt in order to hold the defendant to special bail, the court will never receive any affidavit whatever either to explain or contradict the plaintiff's oath; even an affidavit of the plaintiff's confession that the defendant owes him nothing, will not be received. *Emerson v. Hawkins and others*, 1 Wil. 335. S. C. Say. 53. *Kelly v. Devereux*, 1 Wil. 339. *Heathcote v. Goslin*, Str. 1157.

Not allowed in
K. B.

So that in this court, an affidavit once made, cannot be amended, nor its defects cured by a *supplementary*, nor in anywise contradicted by a *counter affidavit*. *Cope and another v. Cooke*. Do. 467. *Reeks v. Groneman*, 2 Wil.

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225. *Mackenzie v. Mackenzie*, 1 D. & E. 717. *Jacks v. Pemberton*, 5 D. & E. 552.

Thus in the King's Bench, when plaintiff has obtained upon his affidavit a judge's order to hold defendant to bail, no counter affidavit shall be allowed to lessen the bail. But if plaintiff's affidavit is false, he must be indicted for perjury, as in the common case of affidavits for special bail. *Smith v. Fraser*, 1 Blac. Rep. 192.

So in debt on bond, though the defendant says it was usurious, or *per duresi*, it shall not excuse from special bail, for the merits of the cause shall not be determined on motion. *Anon.* Salk. 99, 100.

But in C. B. supplemental and cross affidavits are allowed.

But the practice of the *Common Pleas* differs in this respect, and admits of *supplemental* and even *contradictory* affidavits; for they hold, that notwithstanding the plaintiff makes a positive affidavit of his debt, yet the matter of bail is examinable by the court. *Russell v. Gately*, Bar. 76. Sem. cont. *Hadderweek v. Catmur*, Bar. 61.

An action of debt on bond wherein defendant was held to bail on plaintiff's affidavit, defendant moved for a common appearance, and that plaintiff might produce the bond to the court, upon an affidavit that defendant had great reason to believe that the whole sum due was paid by one of the co-obligors, which would appear by indorsements made on the said bond when produced; plaintiff, in answer, made affidavit, that 100l. and upwards remained due to him on the bond after all just allowances; that he had seen the bond, which was uncanceled and in full force some months before, but had mislaid it; and being severely afflicted with the gout, could not search among his papers himself, so that it could not be produced. It was urged for plaintiff, that no declaration being yet delivered, defendant is not entitled to oyer of the bond. But after a declaration, with a profert in cur. he may demand oyer. The court held, That as the matter of bail is discretionary, and as the measure of the sum for which bail ought to be given is with certainty to be had only from the bond itself, the bond ought to be produced; and for want of producing it, a common appearance was ordered. *Shaw Bart. v. Hawkins*, Bar. 72.

An affidavit made by a third person, that the defendant was indebted, as appears by a stated account, was held

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held insufficient, but made good by another affidavit that the defendant owned the account. *Swarbreck v. Wheeler*, Bar. 106.

So where an executor at first only swore to the debt, as appeared by the accounts of the deceased; a subsequent affidavit, that he *believed* the debt to be due, was admitted to hold to bail. *Roche, executor, v. Carey*, 2 Blac. 850.

So in the case of *Manning v. Williams*, plaintiff made two affidavits; the last was held *prima facie*, sufficient; but cross affidavits being read controverting the fact, common appearance was ordered. Bar. 87.

But in C. B. supplementary affidavits are only allowed where the original affidavit is in itself a good one, such as a perjury can be assigned upon, though perhaps not sufficiently strong to hold defendant to bail; for where the original affidavit itself is null and void through any fatal inaccuracy, or clerical mistake, no supplementary affidavit can be had, nor can the defects be cured.

Provided the first affidavit be a good and valid one.

So that where the affidavit was as follows: A. B. of, &c. make oath, that C. D. of, &c. is justly indebted, instead of *is*; upon a supplementary affidavit being offered, it was refused by the court, who said, that the first was no affidavit, because no perjury could be assigned upon it; that the arrest, therefore, was contrary to law, and that the court could not make *that* lawful which the law says is unlawful; and that supplemental affidavits were only allowed by the court to supply small defects in affidavits not quite full enough, but never allowed, where the first amounted to no oath at all. *Reeks v. Groneman*, 2 Wih. 224.

So in an affidavit that defendant was indebted to plaintiff in the sum of 560l. and upwards, which was held bad for uncertainty, court refused a supplementary affidavit. *Cooke v. Dobree*, 1 H. Blac. 10.

SECTION II.

Of suing out the Writs or Process.

The affidavit of the debt, or cause of action having been made pursuant to the statute 12 G. I. c. 29. as above directed, the next thing to be done is, to sue out the proper

Of suing out the Process.

What is the proper process or writ whereon defendant is to be arrested.

proper writ or process whereon the defendant may be arrested. If the action be brought in the *King's Bench*, and defendant live in *Middlesex*, the process is the *Bill of Middlesex*; if in any other county, a *Latitat*; and if the suit be in *Common Pleas*, it is a *Capias*; which writs differ from the writs used in unbailable actions as before-mentioned in this respect only, that in these bailable writs, by the statute 13 Car. 2. s. 2. c. 2. the cause of action must be particularly expressed; which is done by inserting the clause of *ac etiam** agreeable to the nature of the case; and as defendant is to be arrested upon the above writs, instead of being served with process, it is necessary also to get the proper warrant thereon at the respective sheriffs offices, in order to authorise such arrests. The mode of suing out such process or writs is as follows:

How to sue out process.

Get a warrant to prosecute, upon a 2 s. 6d. stamp, to be filed with the proper officer who signs the writ, agreeable to statute 25 G. 3. c. 80. They may be bought either of the officer, or at the stationers. For the form of which, see ante, ch. 1. pag. 20.

Then if the action be in

B. R.
Bill of Middlesex.

C. B.
Capias.

B. R.

Make a *præcipe* in the following form, provided you sue by bill of Middlesex.

Middlesex, ss. Bill for A. B. against C. D. case for 50l. upon promises (or as the case may be) returnable on Saturday next after the morrow of All Souls. Oath for 25l.

T. S. attorney.

Nov. 1, 1797.

C. B.

Make a *præcipe* thus:

Middlesex to wit. Capias A. B. against C. D. late of Westminster in the said county, yeoman, trespass at Westminster, debt for 50l. returnable on the morrow of All Souls. Oath for 25l.

T. S. attorney.

Nov. 1, 1797.

Get a blank bill (3 s. 6d. stamp), fill it up, carry the *præcipe*, bill, affidavit, and memorandum of warrant to the Bill of Middlesex office, and the officer will sign the bill; pay in term 6d.; in vacation 10d.; it is not to be sealed. Indorse the attorney's name and place of abode,

If the *capias* is sent into any other county, to wit, Cambridge-shire, lay the trespass at Cambridge, or any other town.

Then get a blank writ (4 s. 6d. stamp), fill it up, take *præcipe*, writ, affidavit, and memorandum of warrant to the proper filaxer for the county; if the

* For the different forms of bailable writs, with the *ac etiam*, see ch. 3. sec. 1., and the notes there.

Of suing out the Process.

abode, and sum sworn to, and the day it is sued out, on the back. Then get a (a) warrant thereon at the sheriff's office, for which pay 4d. If sheriff cannot arrest defendant before the return thereof, sue out an alias, after that a pluries; signing each in term or vacation 2d. If defendant lives in any liberty within the county of Middlesex, as in Westminster, sue out a non-omittas bill of Middlesex, for which pay as for a common bill, and the sheriff will thereupon grant his mandate to the high bailiff of Westminster, who will make a warrant to his officer to arrest defendant. If the defendant cannot be found in Middlesex, and is to be met with elsewhere, get an office-copy of the affidavit at the Bill of Middlesex office, which will save a new one being made; pay for same 1s. and 1s. 7d. for the stamp; take it to the signer of the writs in the King's Bench office, and sue out a latitat thereon.

If a warrant to prosecute has been once filed, there needs no other; but add that to the præcipe thus:

"Bill of Middlesex, sued out — day of —."

Latitat. Make a præcipe, same as for bill of Middlesex, only say, latitat instead of bill; get a blank writ (stamp); fill it up, carry the præcipe, latitat, affidavit, and memorandum of warrant to the K. B. office to be signed; pay for signing 2s. 6d.; then to the seal office, Inner Temple-lane, to be sealed, for which pay 7d.

If

the affidavit has not been sworn before, let your client swear it; then pay for the oath 1s.; signing capias 2s. 2d. (i. e. 1s. 2d. for signing, and 1s. for original); the filazer will sign it; get it sealed at the seal office; pay 7d. then get a (a) warrant directed to your officer, at the proper sheriff's office; pay 4d.

If not executed before the return, sue out a capias by continuance, which is precisely the same as the first capias; only in the præcipe to the filazer say, cap. per continuance, for which the filazer charges 10d. signing; 7d. sealing.

Put the date of your first capias on the præcipe.

If defendant live in any liberty, sue out a non-omittas capias to empower the sheriff to enter therein pay signing 8s. 6d.; sealing 1s. 2d.

It was formerly held, that plaintiff lost his bail if he declared in any other county than that in which the capias issued; so that if defendant did not live in the county where plaintiff meant to lay his venue, or could not be found in the county where the capias issued, plaintiff, in order to arrest him in another county, was obliged to issue a testatum capias, grounded upon the supposition that a capias had been before sued out, and returned non est inventus, but which in fact seldom was sued out; wherein it was testified that the defendant lurked and wandered in the bailiwick of the sheriff to which the testatum was to be directed;

B. R.
Alias and pluries bill.

Non-omittas bill.

C. B.
Capias by continuance.

C. B.

Non-omittas capias.

Testatum capias out of use.

B. R.
Latitat.

(a) For observations on the warrant, see the next section of this chapter.

Of suing out the Process.

B. R.
Alias and plu-
ries capias.

If defendant is to be arrested in London, go to one of the compters, get a warrant thereon, pay 4d.; if elsewhere, go to the proper sheriffs' office; for warrant in Surry, Essex, or Kent, pay 6d.; in any other county, 2s. 6d, indorse the attorney's name, sum sworn to, and the day the writ issued.

If latitat be not executed before the return thereof, sue out an alias, (called an alias capias, the testatum part being left out,) and after that a pluries; pay nothing for signing either; for sealing 7d.; make a præcipe as before, only say, alias or pluries capias, instead of "latitat," and put in such præcipe the day the first writ issued.

The pluries writ may be continued from term to term until defendant be arrested, unless plaintiff lies by for four terms, in which case a new latitat must be had.

Non-omittas. If defendant live within a liberty, sue out a non-omittas. If a latitat has been sued out before, pay nothing for signing and sealing; but if not, and it be sued out in the first instance; 2s. 6d. signing, and 1s. 2d. sealing.

If the defendant live in a county palatine, viz. Chester, Lancaster, or Durham, or any of the cinque ports, viz. Hastings, Romney, Hithe, Dover, or Sandwich, then the latitat is to be directed accordingly.

directed; the same as a latitat in the K. B.

But now by a rule, Hilary, 22 G. 3. the testatum writ is rendered useless; whereby "it is ordered by this court, that where an arrest shall be by virtue of a capias ad respondendum in any county, and bail shall be put in thereupon, and the plaintiff shall think proper afterwards to declare in a different county, it shall not be deemed a waiver of bail, but the recognizance of the bail shall be as effectual for the benefit of the plaintiff, and he may proceed thereon against the bail in the same manner as if the plaintiff had declared against the defendant in the same county in which the bail was put in.

So that now if the defendant cannot be found in the county where the first capias issued, the plaintiff's attorney, on taking an office copy of the affidavit marked by the filazer for the county where the first writ issued, may make out a capias (as before) into another county; pay 1s. for the copy of the affidavit, stamp and paper 1s. 7d., signing capias with the new filazer 2s. 2d. seal 7d. without having any return of the first capias.

N. B. The day when the first writ issued, and the county, should be marked on the præcipe. Imp. C. B. 14.

If defendant live in a county palatine or cinque ports, the writ, in that case, may now be a capias instead of a testatum capias as formerly, and the debt must be 20l., but the capias must be directed specially.

By

Of suing out the Process.

By statute 5 & 6 W. & M. c. 21. s. 4., and 9 & 10 W. 3. c. 25. s. 42., the officer who shall sign any writ or process to arrest any person or persons before judgment shall, at the signing thereof, set down upon such writ or process, the day and year of his signing the same.

Officer must set down the day and year of signing writs,

And by a late rule of K. B. the custos brevium must mark the writs numerically as they are received by him. 3 D. & E. 787.

and custos brevium mark them.

For further observations on the mode of suing out the process, and its nature, extent, and operation, see *ante*, ch. 3.

But it may be remarked, that in bailable actions the party should be more particularly cautious that his writ whereon he arrests the defendant, is in every respect regular; because if it be materially otherwise, as if a person be arrested on a *capias ad resp.* where one term intervenes between the teste and return, and therefore the writ be void, not only the proceedings would be null, but the party might maintain his action against the original plaintiff for false imprisonment; nor could he justify under such void process. *Parsons v. Lloyd*, 3 Wil. 344.

If void process be sued out, action will lie for false imprisonment.

SECTION III.

Of the Warrant and Arrest.

(A) The Nature of the Warrant, and its Requisites.

(B) How an Arrest is to be made.

(C) By whom, and when to be made.

(D) Of particular Times and Places when and where the Party is privileged from Arrest.

(E) Of the Sheriff's Fees upon an Arrest.

(F) Of the Defendant being rescued after Arrest.

(A) The Nature of the Warrant, and its Requisites.

(A)

The sheriff being the immediate officer to the King's courts, to him all writs and processes are generally directed, who is sworn to execute the same without favour, dread, or corruption. Dal. Sh. 96, Plow. 74.

All writs directed to the sheriff.

Of the Warrant and Arrest.

But he not executing them himself, a warrant to his bailiff is made out.

When, therefore, a writ has been regularly sued out, and directed to the sheriff of the proper county, that alone would be a sufficient commandment of the court whence it issued to justify the arrest of the defendant, provided the sheriff himself was to make such arrest; but as the sheriff never executes such writs himself, but has inferior officers under him for that purpose, the usual way is, for the writ to be delivered to his immediate deputy or under sheriff, who makes out his warrant to his bailiff or officer for the execution of such writ.

How to be made.

This warrant must be made agreeable to the nature of the writ, containing the substance thereof, and be in the high sheriff's name, under the seal of office. When so made, it is given to the attorney in the cause suing out the writ, who delivers it to the sheriff's bailiff or officer whom he usually employs in that county, and it operates as an authority to such officer to make the arrest.

How directed.

The warrant may be specially directed to a private person,

Must not be a blank warrant.

But it must not be a blank warrant to be afterwards filled up by the attorney, as such a one would be void, and the party arrested thereon discharged. *Bursem v. Fern*, 2. Wil. 47.

So if the warrant be directed to A. B. one of the sheriff's bailiffs, and after it is sealed C. D. executes it, and gets his name inserted; or if a blank be left for the name, and C. D. puts his name in, and arrests defendant, it is a void arrest; and on motion party will be discharged. Mich. T. 1794.

Must be had before the arrest.

The warrant must be had *before the arrest*. For if an officer arrest a person before he hath a warrant, though he may afterwards procure one, or though one may come to him to arrest the party for the same cause; yet such arrest would be wrongful, and the party grieved may have his action of false imprisonment. 4 Bac. Abr. 452.

Must not be made out before the sheriff has the writ.

The warrant must not be made out by any high sheriff, under sheriff, their deputies or agents, *before they have in their custody the writ* upon which such warrant ought to issue, on forfeiture of 10l. Stat. 6 G. 1. c. 21. s. 53.

Though formerly otherwise.

Previous to this statute, if a writ was in fact sued out, though the sheriff had made his warrant before the writ came to his hand, it was held well. *Jones v. Green*, 2 Lev. 19. S. C. 1 Saund. 298.; but it is now otherwise.

Must be dated as the writ.

The warrant must have the same day and year set down thereon as shall be set down upon the writ itself, under forfeiture of 10l., to be paid by the persons who shall

Of the Warrant and Arrest.

shall fill up or deliver out such warrant. Stat. 6 G. 1. c. 21. f. 24.

The warrant must, before the service or execution thereof, be subscribed or indorsed with the name of the attorney by whom the writ was sued forth. Stat. 2 G. 2. c. 23. f. 22.

Must have the attorney's name thereon.

But the want of such subscription or indorsement on the warrant shall not vitiate the writ, but such writ shall be valid and effectual, provided the writ itself whereon such warrant is made out, be regularly subscribed or indorsed, according to the 2 G. 2. But the sheriff or officer making out the warrant, and not subscribing or indorsing the name of such attorney thereon, shall forfeit 5l., to be assessed as a fine by the court out of which such writ shall issue; one moiety to his majesty, and the other to the person aggrieved. Stat. 12 G. 2. c. 13. f. 4.

But not void for want thereof, if it be on the writ.

Though sheriff liable to a fine.

Before this statute of 12 G. 2. it was held, that although no attorney's name were to the writ, yet the process was not void; the attorney might be punished for the neglect, but the party was not to suffer. *Fowkes v. Jay*, P. R. 440. *Blackall v. Gould*, Ib. 441. But now such indorsement must be to the writ, though not necessarily to the warrant. *Grice v. Allen*, P. R. 442.

Practice formerly otherwise.

(B) How an Arrest is to be made.

(B)

An arrest must be by corporal seizing, or touching the defendant's body. No words will make an arrest.

An arrest, what.

A bailiff seeing the defendant at a little distance, told him, he arrested him; upon which the defendant, having a fork in his hand, kept the bailiff off from touching him, and retreated into his house. An attachment was moved for, on the ground of a contempt; but was refused, because there was no arrest, nor rescue, and the bailiff was left to his action for the assault. *Genner v. Sparks*, 6 Mod. 173.

Bailiff must touch defendant.

But any touching of the defendant's body is sufficient, though the bailiff only lays hold of his hand as he holds it out of the window. *Anon.* 1 Vent. 306.

What touching will do.

After the bailiff has once touched the defendant, but not till then, he may justify breaking open the house in which he is, to take him. *Anon.* 6 Mod. 105., where a variety of cases are cited.

In what cases doors may be broke open.

But

Of the Warrant and Arrest.

Inner doors no protection.

But even before the touching, if the bailiff gets peaceable entrance at the *outer* door of the house, he may break open an *inner* door to make the arrest, though it be the door of a lodger; for inner doors have no protection, but only outer doors and windows, which are intended for the security of the house. *Lee v. Gansel*, Cow. 1.

(C)

(C) By whom, and when the Arrest is to be made.

In common cases.

The bailiffs, or officers appointed by the respective sheriffs, are, for the most part, the persons who make arrests; but the warrant may be directed to a private person, who may act as a special bailiff for that purpose.

In franchises, and what meant thereby.

By the 5 G. 2. in franchises and peculiar jurisdictions, the proper officers there must make the arrest; but by franchises are merely meant particular *liberties*. Counties palatine are not included in that term. *Griffin v. Alcock*, 2 Barn. 400.

In counties palatine.

In counties palatine the arrest is made by the sheriff, or his bailiff, by virtue of a mandate from the officer to whom the writ is directed. In particular liberties it is made by the bailiff of such liberty, by virtue of a mandate from the sheriff.

In liberties.

Sheriff may enter liberties with non-omittas.

But this is only where no *non-omittas* is sued out; for under that writ the sheriff himself may enter the liberty, and make the arrest. If there be two liberties in a county, and the sheriff makes his mandate to the bailiff of one of them, who returns him no answer, he may, upon a *non-omittas*, arrest the defendant in either liberty. 5 Co. 92. *Gilb. C. B.* 29.

The consequence if he has none.

But should a sheriff make an arrest in any liberty without a *non-omittas* being sued out, the consequence would only be, that the sheriff would be subject to an action; for the arrest would stand good. *Gilb. C. B.* 27.

It was formerly doubted, how far any follower or assistant of a bailiff could make the arrest, especially unless in the actual presence of the bailiff himself.

How far it is necessary for the bailiff to be concerned in the arrest.

But it seems now settled, that the bailiff need not be the hand that arrests, nor need he be actually present, or even in sight, nor within any precise distance of the person arrested; but the arrest must be made by the authority of the bailiff, who ought to be *quodam modo*, present at the time. *Blatch v. Archer*, Cow. 65, B. N. P. 63.

Of the Warrant and Arrest.

An arrest cannot be made *after* the return day of the writ or process; for the writ has then expired. 1 Sid. 229. Moore, 701. Arrest must not be after return day.

Writs returnable on the Sunday must be executed the latest on the Saturday before. If defendant be arrested on the Monday, and detained only a short time till writ renewed, the arrest is void, and detention illegal. *Love-ridge v. Plaistow*, 6 D. & E. 29.

(D) Of particular Times and Places when and where the Defendant is privileged from Arrest. (D)

If a defendant be a party to, or a witness in any cause, and is either going to, or attending upon, or returning from the court, he is, during that time, privileged from arrest, which is commonly called, being privileged *eundo, morando, et redeundo*. Parties to, and witnesses in causes, privileged.

Nor have the courts ever been inclined to restrict this privilege; on the contrary, every reasonable indulgence has been allowed to persons claiming it. Courts have favoured this privilege.

Thus it has been held, that the protection was not forfeited, because a man did not go home the direct road, but was arrested forty miles out of the way; since it might be, he went to buy a horse, victuals, or other necessities for his journey. Neither is the law so strict in point of time as to require the party to set out immediately after the trial is over. Thus in the case of *Hatch v. Blisset*, Gilb. Cas. 308. the trial was at Winchester assizes, and was on Friday in the afternoon; but the party staid until after dinner on the Saturday, and in the evening, at seven, was arrested going home to Portsmouth, which is twenty miles; and the court held, she ought to be discharged, her protection not being expired, and a little deviation or loitering would not alter it. *Holiday v. Pitt*, Str. 985.

To the same effect is the case of *Lightfoot v. Cameron*, 2 Blac. Rep. 1113., where, after the rising of the court, defendant went to dine with some friends at the King's Arms Tavern in New Palace-yard, where he was arrested, but was discharged on the ground of his privilege *redeundo*.

It is said, that this privilege extends to a party, or witness, who attends in inferior courts of record, as in the courts of London, or at the sessions. Com. Dig. Privilege, A.; but *Q.* see the cases there cited. Whether it extends to inferior courts.

It

Of the Warrant and Arrest.

It does not, however, protect a person while attending commissioners of bankrupt to prove a debt. *Kinder v. Williams*, 4 D. & E. 377.

Clergymen how privileged.

Clergymen (by particular statutes, 50 Edw. 3. c. 5. & 1 Ric. 2. c. 16.) whilst they are performing divine service, and not merely staying in the church with a fraudulent design, are privileged from arrests.

What places privileged.

There are also certain *places* within which a person is privileged from arrest; such is every man's own house, if the outer door be shut; the King's court of justice, if the court be sitting; and the (a) verge of the royal palace, except it be on process out of the palace court; nor can an arrest be made in the king's presence. 3 Blac. Com. 289.

An arrest within the King's palace by an officer of the palace court, of a person not of the household, against whom a writ has issued out of that court, is good, though no leave to make the arrest has been obtained from the Board of Green Cloth, and no indictment will lie against the officer making it. *Ren v. Stobbs*. 3 D. & E. 735.

(E)

(E) Of the Sheriff's Fees and Conduct towards Defendant upon an Arrest.

The statute 23 H. 6. cap. 10. enacts, "That for an arrest, or attachment, the sheriff shall have 20d. and the bailiff who makes the arrest 4d.; and that the sheriff or bailiff who doth contrary, shall pay treble damages to the party grieved, and forfeit the sum of 40l.; one moiety to the king, and the other to the party that will sue; and that the justices of assize in their sessions, justices of the one bench and of the other, and justices of peace in their county, may determine the said offences."

For the conduct of the sheriff or his officer towards the defendant immediately after the arrest, to what place he should be taken and the like, see 32 Geo. 2. ch. 28.

In the case of *Newnham v. Lunn*, 5 Mod. 225. an action of debt was brought against a bailiff on the statute 23 H. 6. ch. 10. for taking 5s. 6d. for an arrest, and plaintiff recovered.

(a) The verge of the palace of Westminster extends by stat. 28 Hen. 3. c. 12. from Charing-Cross to Westminster-Hall. 3 Blac. Com. 289.

Of the Warrant and Arrest.

In general now, the master allows 10s. 6d. for an arrest in town, and 1l. 1s. in the country, and 1s. per mile for taking defendant to gaol if at any distance.

In the case of *Boldero and others v. Mosse and others*, two of the defendants having been arrested for 423l. each, by virtue of a latitat directed to the chamberlain of the county palatine of Lancaster, a judge's order was obtained for staying proceedings upon payment of debt and costs. In the bill offered for taxation, the agent in the country made a charge of 4l. paid to the sheriff's officer for the arrests, being at the rate of 2l. each, which the master refused to allow, and struck off the overplus above the usual charge made in other counties, which is in general a guinea. Dallas now moved, that the master might review his taxation upon affidavits, stating, that the charge made was such as was directed by a table of fees settled by the justices of the county in sessions in 1767, and which had been acted under ever since; the sessions having made the same under an idea, that they were authorised so to do by 32 G. 2. c. 28. The court, however, denied the motion, saying, that the justices in sessions had no authority to fix fees for the court of B. R., and that if bailiffs should in future exact more than the usual sum, they might be guilty of extortion in taking more than was allowed, *colore officii*. 3 D. & E. 417.

(F) Of the Defendant being rescued after the Arrest.

(F)

If the defendant, after he has been legally arrested, be rescued by force from the officer *before* he is carried to prison, such rescue is an excuse to the sheriff, and he may make a return thereof when called upon for the writ.

Rescue, an excuse to the officer, when.

A rescue is deemed an offence of such a nature, that whenever the sheriff makes a return of any one having been guilty thereof, the court will grant an attachment against such person in the first instance. *Anon. Say. 121.*

How rescuer punishable, if returned such by sheriff.

And the court will proceed to punish him without going through the ordinary course of his being examined upon interrogatories, as no denial by him upon such examination could excuse him after having been returned

By attachment in a summary way.

Of the Warrant and Arrest.

guilty of a rescue by the sheriff, for the return is not traversable. *Rex v. Elkins*, Burr. 2129.

For such a return by the sheriff, is of itself a conviction of a rescue, and process immediately issues from the crown-office against the rescuer as upon a conviction; and if it is a false return, the remedy is by action against the sheriff for a false return. *The King v. Pember*, Cas. temp. Hard. 112.

But the court will permit the defendant, in mitigation of the fine, to shew, that in fact there was no legal arrest, it being in the night, and the like. *Rex v. Minify and others*, Str. 642.

There was anciently a settled fine for rescuers; namely, 4 nobles; but the courts now fine according to their discretion, governed by the circumstances of the case. In the case of *Rex v. Minify*, they only fined the offender 1s; and in the case of *Elkins*, 5l.

No attachment without the rescue is returned.

But the courts will not grant an attachment for a rescue, without a return thereof by the sheriff; a mere affidavit of the fact will not be sufficient; and this, whether it be a rescue on mesne process or in execution. *Sheather v. Holt*, Str. 531. *Anon.* Salk. 586.

How attachment returnable.

Attachments for a rescue must be made returnable at a general return, though the original process was at a day certain. *Dominus v. Wilkins*, Str. 624.

What other remedies.

Besides this mode of proceeding by attachment, there are other remedies at the election of the party; namely, by action on the case or indictment. Com. Dig. tit. Rescous.

When a return of rescue is not good.

But it is to be observed, that the return of a rescue is only good where the defendant has been rescued before he was committed to prison; for afterwards the sheriff is to take care of him at his risk; and even if he be ordered to be removed, or to be brought up to any court by *habeas corpus*, the sheriff must at his peril guard him; and should any danger be apprehended, he must take the *posse comitatus* to secure him; for in case of any rescue by any persons, except common enemies, the sheriff will be responsible; nor will such rescue be any excuse, but an action may even be brought against him for a voluntary escape. *O'Neil v. Marston*, Burr. 2812.

SECTION IV.

Of Bail to the Sheriff, or Bail below.

For an account of the origin of bail in civil cases, and the alterations which in this respect have from time to time been made in the common law by different statutes, we must refer the reader to the introduction of this work, confining ourselves at present to what more immediately concerns the modern practice.

(A) The general Meaning of this Bail, and how given to the Sheriff.

(B) The Statute 23 H. 6. considered, and herein,

(B. 1) *The Reason and Nature of the Statute.*

(B. 2) *To what Persons and Cases it extends.*

(B. 3) *How far the Sheriff is compellable to take Bail; and of the Number and Qualification of the Sureties.*

(B. 4) *Of the Nature of the Security, and how it must be made; with the Form of the Condition of the Bond.*

(B. 5) *What Variations in point of Form will vitiate the Bond.*

(B. 6) *Of the Operation of the Bail Bond, and how far the Plaintiff in the Action is affected thereby.*

(B. 7) *Of proceeding against the Sheriff for acting contrary to the Statute.*

(A) The general Meaning of Bail below, and how given to the Sheriff.

(A)

When the defendant is regularly arrested, he must either go to a prison for safe custody, or enter into a bond, called a bail bond, with sureties, to be approved of by the sheriff, conditioned for his appearance in court at the return of the writ. It is called *bail* (from the French word *bailier*, to deliver), because the defendant is bailed, or delivered to his sureties upon their giving security for his appearance, and is supposed to continue in their friendly custody, instead of going to gaol; and it is further denominated *bail below*, in opposition to that bail which is afterwards put in when the defendant does appear upon the

Why called bail.

Of the Bail Bond.

the return of the writ, of which we shall presently treat, and which is called bail *above*.

Sheriff may let defendant go without bail, at his own risk.

The sheriff, if he pleases, may let the defendant go without any security, but that is at his own peril; for having once taken him, he is bound to keep him safely so as to be forthcoming in court; otherwise an action lies against him for an escape.

So an action lies if he did not arrest him when he had him in view, and might have arrested him.

If forthcoming at return of writ, it is sufficient.

But if the sheriff has him at the return of the writ, though after the arrest he let him go at large, it is sufficient. *Atkinson v. Matteson*, 2 D. and E. 177.

How bail is given to the sheriff.

The method of giving bail to the sheriff is, by entering into a bond or obligation with one or more sureties, (not fictitious persons as in the former case of common bail, but real, substantial, responsible bondsmen,) to insure the defendant's appearance at the return of the writ, which obligation is called the bail bond, and is in the following form:

Form of bail bond.

Know all men by these presents, that we, C. D. of, &c. E. F. of, &c. and G. H. of, &c. are held and firmly bound to

, Esq. sheriff of the county of Middlesex, in the sum of (double the sum indorsed on the writ) of lawful money of Great Britain, to be paid to the said sheriff, or his attorney, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, and each of us for himself, in the whole, our and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated, &c.

The condition of this obligation is such, that if the above bounden, C. D. do appear before (a) our lord the king at Westminster, on, &c. (if by bill, &c. a day certain; if by original, a general return day), to answer to A. B. in a plea of trespass, and also to, &c. (here insert the act etiam), according to the custom, &c. then this obligation to be void, otherwise to remain in full force and virtue.

The bail bond is on a double sixpenny stamp, and the sum indorsed usually written in the margin of the bond.

What sum bail to be taken for.

By the statute 12 G. I. c. 29. the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and indorsed on the back of the writ.

(a) If in C. B. "Before the justices of our lord the King of the Bench."

But

Of the Bail Bond.

But the general practice is to take it in double the sum sworn to; and even if it be more, it shall not be bad, provided it appears to be through mistake, and without any intent to oppress the defendant. *Norden v. Horsley*, 2 Wil. 69.

Generally double the sum sworn to.

(B) The Statute of 23 H. 6. considered.

(B)

The chief statute for the regulation of bail upon the arrest on mesne process, is the 23 H. 6. c. 9, which enacts as follows:

S. 5. *That the sheriffs, and all other officers and ministers therein mentioned, shall let out of prison all manner of persons by them or any of them arrested, or being in their custody by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills, or warrants, shall require.*

S. 7. *And that no sheriff, nor any of the officers or ministers aforesaid, shall take or cause to be taken, or make any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person, nor by any person which shall be in their ward, by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants shall require.*

S. 8. *And if any of the said sheriffs, or other officers or ministers aforesaid, take any obligation in other form by colour of their offices, that it shall be void.*

S. 11. *And that all sheriffs, &c. which act contrary thereto, shall lose to the party grieved treble damages, and shall forfeit the sum of 40l. for every offence, one half to the king, the other to the informer.*

S. 14. *And if the said sheriffs return upon any person cepi corpus, or reddidit se, that they shall be chargeable, to have the bodies of the said persons at the days of the returns of the writs, bills, or warrants, in such form as they were before the making of this act.*

(B. 1) *The Reason and Nature of the Statute.*

(B. 1)

By the common law, the sheriff was not obliged to let persons to bail, but might insist upon keeping them in custody till the return of the process, unless they were replevied

At common law sheriffs not obliged to let to bail.

Of Bail to the Sheriff, or Bail below.

Great oppressions therefrom; to remedy which this statute was passed.

Its intent and operation.

This statute is a public statute;

therefore need not be set out in pleading.

reprieved by the writ *de homine replegiando*. Hence the greatest hardships were endured, not only from the confinement itself, but especially from the scandalous extortions from defendants by the sheriffs, or their officers, in order to purchase their ease and favour in, or their temporary enlargement from prison. It was to remedy these grievances that this statute of Hen. 6. was made.

It was not passed to give the sheriff any *new* power, or to enable him to take bail in cases where he could not bail before; but in order to compel him to take bail in those cases where he might have taken bail, and refused so to do. *Bengough v. Rossiter*, 4 D. & E. 508.

It was formerly the better opinion, so far as the majority of cases go, that this statute of H. 6. was a *private* statute, and ought to be pleaded; but it seems now otherwise: and in the case of *Samuel v. Evans*, 2 D. & E. 575, all the judges agreed, that it was unquestionably a general and *public* statute, of which the courts are to take notice without pleading. If, therefore, it appears in any manner upon the face of the record, that the bond was given under the statute to a sheriff *colore officii*, and is not a bond according to the statute, even after verdict judgment shall not be arrested, though the statute was never pleaded, but only the general issue *non est factum*. Defendant may bring it upon the record if he please, by craving *oyer* of the bond, and demurring; but without that, in an action by the assignee of the bail bond it is sufficiently notorious. *Vide* the above case, as all the other cases are there cited and animadverted upon. As it is a public statute, if the defendant unnecessarily sets it out in his plea, the misrecital of a letter will be fatal. *Boyce v. Whitaker*, Do. 96.

(B. 2)

(B. 2) *To what Persons and Cases it extends.*

The statute only speaks of, and extends to persons arrested on mesne process.

Only to arrests on mesne process, not in execution.

The cases, therefore, of sheriffs taking securities, &c. by way of indemnifying them against any irregularity respecting executions of *fi. fac.* or persons in execution on *ca. sa.* do not affect any question respecting this statute. *Rogers v. Reeves*, 1 D. & E. 421.

Though by one case it seems otherwise.

But in the case of *Bracebridge v. Vaughan*, Cro. Eliz. 66. it was held, that where the marshal of the King's Bench taketh

Of the Bail Bond.

taketh bond for the easement or delivery of a prisoner in execution, it is void by the statute of 23 H. 6. although he be not named in the statute; for divers persons are intended in the purview of the statute, which are not mentioned therein.

It is not actually necessary for the party to be arrested in order to bring the bond within the statute; for the bail bond may be given without the party having been exposed to an arrest; and in an action by an assignee on such bond, the arrest need not be stated, for it is not traversable. *Haley v. Fitzgerald*, Str. 643.

The bond may be taken without any actual arrest.

The arrest not being traversable.

But the bail bond must be taken by the sheriff before the return of the writ, or will be void. *Pullein v. Benson*, 1 Ray. 352.

This statute refers only to process in courts of common law. *Studd v. Aston*, 1 H. Black. 468.

It does not extend to courts of equity.

Not to any attachments out of a court of equity.

lb.

Nor to any attachment for a contempt, Str. 479.; for sheriff cannot take bail thereon.

Nor to attachments.

Nor to cases of bail on indictment at the quarter session. It may appear indeed, by the 5th section of the statute, as if sheriffs were authorised to take a bond for the appearance of persons arrested by them, under process issuing upon an indictment; and if that statute stood alone, they might perhaps, to a certain degree, have exercised that power; but even if such a power existed, it was afterwards taken away by the subsequent statute of 1 Edw. 4. c. 2. which passed in the next reign; and it is now settled, that it is the sheriff's duty in such case not to take a bond under this statute, but only a recognizance in the usual way. *Bengough and another v. Rossiter*, 4 D. & E. 505.

Nor to indictments.

This statute extends only to such bonds, which any person in the sheriff's ward makes to him. 10 Co. 100.

If a sheriff, or gaoler, for the ease and enlargement of any who is in his ward, takes a promise to save him harmless, that, although the statute speaks only of an obligation with condition, is equally void, as being of equal mischief. 10 Co. 101.

It extends to promises as well as bonds.

The statute speaks only of obligations given to the sheriff, and does not extend to such as are given to the party—plaintiff. 1 Term. Rep. 422.

But not to bonds given to the party.

If, after defendant is arrested at the suit of plaintiff, a third person, together with him, gives a bond to plaintiff, with a condition, that if defendant should give such security

For the plaintiff may direct officer to take any agreement he pleases.

Of Bail to the Sheriff, or Bail below.

rity as the plaintiff should approve of, for the payment of 90l. to him, or should render his body to him at the return of the writ, then the obligation to be void, otherwise, &c. such bond shall be good against the third person; because, although if the sheriff take a bond in another man's name to elude the statute, such bond is void; yet the plaintiff himself may give directions to the officer to take such bond as this to himself, and the agreement of the plaintiff makes it good. 2 Mod. 314.

Nor to a bond given to plaintiff by a third person for the ease of defendant.

So if a *capias* be taken out against the defendant, and a third person gives the plaintiff a bond that the defendant shall pay the money, or render himself at the return of the writ, it is a good bond, and not within the statute, because it is not by the direction of the officer, but by the agreement of the plaintiff, and there is no law that makes the agreement of the parties void; and if the bond was not taken by such agreement, it may be traversed. 2 Mod. 305.

Nor to any undertaking between the attornies of plaintiff and defendant.

So all undertakings or agreements made between the attornies of defendants and plaintiffs shall be enforced by the court, even by the summary proceeding of attachment, they being officers of the court; because when an application is made against an attorney on his undertaking, it is by the plaintiff against him, to compel a performance of a contract entered into to him, and on that ground it is valid. The rule of court, therefore, stands perfectly clear of the regulations of the act of parliament.

The distinction to be observed in such cases.

The distinction between the above cited cases being, where the undertaking is to the plaintiff in the cause, and where it is made to the sheriff; if the latter, the form of the statute must be strictly pursued. *Rogers v. Reeves*, 1 D. & E. 422.

(B. 3)

(B. 3) *How far the Sheriff is compellable to take Bail; and of the Number and Qualification of the Sureties.*

Sheriff obliged to take good bail if offered;

without any fee or reward.

The sheriff, or his officer, is now obliged to admit a man to bail, provided good and sufficient sureties be tendered, but not otherwise; and an action on the case will lie against him if he refuses.

And as it is his *duty* so to do, he must not take money for it; if he does, he will be liable to an attachment. And although he should recover a verdict, upon a promise to pay him money if he would accept of the bail offered,

Of the Bail Bond.

offered, yet on error brought, judgment will be reversed upon the ground of its being an illegal consideration. *Stotesbury v. Smith*, Bur. 927.

By the words of the statute, "reasonable sureties of sufficient persons," (in the plural number,) it seems as if the statute meant to prescribe *two* sureties, and that the bail bond would be void with a less number. But this clause is intended only for the benefit and security of the sheriff, and is more for counsel and direction to him than for precept and restraint; as he is responsible for the appearance of the defendant after the arrest, and as he is compellable to take bail according to this statute, it is but just that he should have reasonable and good security for his indemnity; the statute therefore *allows* him *two* sufficient persons as sureties; and unless the defendant can find two bondsmen having sufficient within the same county, the sheriff is not obliged to let him to bail; but it does not compel him to take two: for if he chuses to run the risque, (it is at his peril so to do,) he may take *one* surety only, and the bail bond will not be void on that account. 10 Co. 101.

No actual necessity for two sureties.

Sheriff if he pleases may take only one.

An action will not lie against the sheriff for taking insufficient bail; but if he hath not the defendant forthcoming to appear and answer the plaintiff, he may be amerced, provided the plaintiff has not accepted an assignment of the bail bond. Salk. 57. 6 Mod. 122.

No action against sheriff for taking insufficient bail.

(B. 4) *Of the Nature of the Security, how to be made, with the Form of the Condition of the Bond.*

(B. 4)

The security given to the sheriff must be a bond, the statute having prescribed that form of security, and declared that all others shall be void.

It must be a bond.

An agreement in writing, therefore, to put in good bail for a person arrested on mesne process, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person, with the bailiff of the sheriff in consideration of his discharging the party arrested, was held void; for that was only a simple contract. *Rogers v. Reeves*, 1 D. & E. 418.

No agreement will do.

And this bond must be made in a peculiar mode, as directed by the act.

1st, The bond must be made to the sheriff himself.

How such bond must be made.

2dly, It must be made to him, *as such*, by the name of his office,

Of Bail to the Sheriff, or Bail below.

office. 3dly, It must be only for the appearance of the party, and for no other purpose. *Ib.* & *Cro. Eliz.* 862.

1st, To the sheriff himself.

The bond must be made to the sheriff himself, and to no other person.

Not even to any bailiff.

Not even to their bailiffs; for the statute does not authorise sheriff's bailiffs to take obligations for the appearance of persons arrested. For though it mentions bailiffs, it only means bailiffs of franchises, and such officers as have the return of process; for where the process is directed to the sheriff, the indemnity must be to him. *Rogers v. Reeves*, 1 D. & E. 422.

Not to any third person.

For although it be made to a third person, (by the nomination of the sheriff,) and upon such condition as the statute prescribes for the surety of the sheriff, it is void; because the act prescribes the bond to be made to the sheriff himself, and that is part of the essential form. 10 Co. 100.

2d, It must be made to him as sheriff.

It is not sufficient for it to be made to himself, but it must be made to him *as sheriff*. 1 T. R. 422.

It sufficiently appears, that a bond was taken by the name of office, when it is made payable *eidem vicecomiti & assignatis*. Str. 893.

Whenever it be taken *quatenus sheriff*, to let the obligor go at large, it is sufficient. 2 Keb. 108. 122. 1 Sid. 300.

3d, Condition must be for appearance of defendant.

The condition of the bond must be for the appearance of defendant on the return of the writ.

If the condition of the bond be not for the appearance of the defendant upon the very return day mentioned in the writ, it is void. Saun. 21.

Bail bond need not pursue the very words of the process.

But bail bonds need not pursue the very words of the process.

A special original was taken out returnable *coram domino rege ubicumque tunc fuerit in Anglia*, and the bail bond was without the words *ubicumque*, &c. and in an action upon it, it was objected, that by the statute of H. 6. (which was pleaded) the sheriff could take no bond but such as was to appear at the place mentioned in the writ, whereas this might be to compel an appearance out of England, if the king should happen to be so: but *per cur.* There are no set forms of words for these bonds; but if in substance they are to appear according to the design of the writ, it is sufficient. 2 Cro. 286. 2 Vent. 237. *Gardner v. Dudgate*, 2 Show. 51. 2 Lev. 180.

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Trin. 3 Geo. 2. *Philips v. Philips*, in *Scaccario* upon a *quo minus*, the bond was to appear in the office of pleas in the court of Exchequer at Westminster, and that was held well enough, though the process was to appear before the barons. We will understand, that by appearing before the king, is meant, before the king in his court, and not before the king in person. The plaintiff must have judgment. *Shuttleworth v. Pilkington*, Str. 1155. *King v. Pippett*, 1 D. & E. 240.

So where the writ was to appear before the lord the king at Westminster, and the condition was to appear before the justices of the King's Bench at Westminster, the bond was held good. 2 Lev. 180.

So where the condition varied from the writ, in not setting out the *ac etiam*, or the sum mentioned therein, it was held immaterial. *Villiers v. Hastings*, Cro. Jac. 286.

And where the proceedings were even by original, and the writ was on a plea of *trespass on the case* on promises, and the condition of the bail bond in a plea of trespass only, it was held immaterial, for the bail-bond need not disclose the nature of the action, it is sufficient if it sets forth the parties and the time and place of appearance. *Owen v. Nail*, 6 D. & E. 703.

If a sheriff takes one bail bond upon a debt by three jointly and severally, it is not according to the statute, being for a joint appearance to several actions. 6 Mod. 122.

(B. 5) *What Variation in point of Form will vitiate the Bond.*

(B. 5)

By sect. 8. it is said, all bonds *in any other form* shall be void.

Now there are two kinds of forms, *fi. forma verbalis*, and *forma legalis*; the first stands upon the letters and syllables of the act; the last is *forma essentialis*, and stands upon the substance of the thing to be done, and upon the sense of the statute; it is only, therefore, variations in point of the *forma legalis*, or matter of substance, that shall vitiate the bond:

Must be a variation in matter of substance;

As, if the sheriff takes a *single* bond of one in his ward who was bailable, it is void: for this bond wants the essential form prescribed by the statute, for the condition prescribed there is wanting. *Ib.*

as if without a condition,

Of Bail to the Sheriff, or Bail below.

or any addition
to the condition.

So if the sheriff adds to the condition, that he shall be kept without damage against the king and plaintiff, &c. that shall make the whole condition void. Ib.

So if the condition be, to be a true prisoner, or to pay for his meat and drink.

Or if the sheriff adds any thing to the matter prescribed by the statute; as, to pay so much money for an horse, &c. this addition makes the whole bond void, for it is taken in other form (touching the substance matter) than is prescribed by the statute. Ib. Inasmuch as the condition should be for the appearance of the party, and for no other purpose.

But mere verbal
variation shall
not hurt.

But variations merely in matters of *forma verbalis* shall not vitiate, as where the condition of the bond was for the defendant to appear *in person*; whereas the words of the statute are, shall appear generally, without the words, in person, or, that he shall appear at the day, &c. *ad respondendum*; whereas the words *ad respondendum* are more than the statute prescribes: The bond shall not be void; because, though there is a verbal, there is not a substantial difference; the *way* of appearance being in *person*, and the *purpose* thereof being *ad respondendum*. 10 Co. 101. *Kirkbridge v. Wilson*, 2 Lev. 123. See also *Mildmay v. Case*, Sir T. Ray, 220. 3 Keb. 111. 164. 1 Vent. 233, and *ante* B. 4.

(B. 6)

(B. 6) *Of the Operation of the Bail Bond, so far as it affects the Plaintiff in the Action.*

By the 14 sec. of the statute, it seems, that notwithstanding such bail bonds, the sheriff shall be equally liable as before the statute, to be called upon by plaintiff to bring in the body, or on default thereof, to be amerced. So that although the sheriff takes a bail bond on this statute, yet it is at his peril, and only for his own security; plaintiff shall not thereby be concluded, but may still compel him to bring into court the body of defendant, by putting in good special bail. *Wolfe v. Collingwood*, Wil. 262.

(B. 7)

(B. 7) *Of Proceedings against the Sheriff for acting contrary to the Statutes.*

If any one, aggrieved by the sheriff's acting contrary to this statute, wishes to sue on the act, he must have
his

Of the Bail Bond.

his action on the case against the sheriff for his damages, which must be assessed by a jury, and then plaintiff may enter up judgment for *treble* that sum, according to this act.

He may also have another action for the penalty, for they are quite distinct matters, and recovered by different kinds of action, viz. case and debt qui tam.

A common informer may prosecute for the latter in *debt*; but the party *aggrieved* only can maintain an action on the case.

SECTION V.

Of Bail to the Action, or Bail above.

The defendant having put in bail to the sheriff, by entering into a bail bond, as before described, the next step to be taken is, his *appearance*, according to the condition of the bond, and the exigency of the writ; which appearance is effected by putting in *bail to the action*, commonly called *bail above*, in opposition to the bail given to the sheriff, usually termed *bail below*.

What it is.

The *bail below*, or to the *sheriff*, only undertake for defendant's *appearance on the return day of the writ*, (i. e.) for his putting in *special bail to the action*; for his appearance can be effected by no other means; whereas the *bail above*, or to the *action*, are bound either to satisfy plaintiff his debt and costs, or to render their principal into his custody, provided judgment should be against defendant, and defendant himself should fail so to do.

The nature of their undertaking.

If the defendant's attorney has undertaken to put in bail, which is sometimes the case, or if the sheriff, or the *bail below*, for their own indemnity, wish to put in special bail, either of them may do so, although the defendant himself should not consent, for otherwise they might suffer by defendant's obstinacy.

May be put in against defendant's consent.

In the treating of this extensive and important head of practice, we shall consider

(A) When and how Bail is to be put in, and of the Notice thereof.

(A. 1) *In Town.*

(A. 2) *Before Commissioners in the Country.*

(B) Of

Of Bail to the Action, or Bail above.

- (B) Of accepting Bail, and filing the Bail Piece.
- (C) Of excepting to Bail.
- (D) Of perfecting Bail, and herein of the justifying, adding, opposing, and allowing of the Bail.

(A) (A) When, and how Bail is to be put in, and of the Notice thereof.

(A. 1)

(A. 1) *In Town.*

When to put in
bail above.
In town.

If defendant be arrested in London or Middlesex, he must put in special bail to the action.

In B. R.

In 4 days after the return of the writ or process, let it be made returnable when it may be.
R. M. 8 Ann.

Except the action be by special original, then defendant has till 4 days after the quarto die post to put in bail. Frampton v. Barber, 4 D. & E. 377.

In C. B.

In 4 days after the first day of term, provided the process be returnable the first return of the term; but if returnable on any other return, then 4 days after such day when it is made returnable. R. Trin. 30 G. 3.

N. B. How these days are reckoned, see *Observations infra.*

But if defendant be arrested in any other city, or county, then

Six days after the return of the process. R. M. 8 Ann.

Unless proceedings be by original, then in 8 days, i. e. 4 days after quarto die post.

If the suit be by bill, go to the office where the writ was signed, or to the sheriff's office, for a short copy of the writ, together with the sum sworn to; get a special bail-piece at the stationers, pay for same 2s. 1d.; fill it up properly, with the name of the county, of the bail, &c. (for which see the remarks below); carry it to a judge's chamber, and having the bail with you ready,

Eight days after the first day of term, if process returnable the first return; if on any other return, eight days after such return day. R. Trin. 30 G. 3.

Carry an abstract of the writ, and the names and additions of the bail to the filaxer, who will enter them in his book, kept for that purpose, and he, or his clerk, will attend at the judge's chambers, with the bail, to take the recognizance; which is done by an entry in the filaxer's book, and not by a bail-piece, which entry he will afterwards draw up in proper form, if there should be

How to put it
in.

Of putting in Special Bail.

ready, apply to the judge's clerk to take the bail, to whom you pay 4s. in term, 5s. in vacation.

He will take the recognizance, which is in the following form :

You do jointly and severally undertake, that if A. B. shall be condemned in this action at the suit of C. D. he shall satisfy the costs and condemnation, or render himself to the custody of the marshal of the marshalsea, or you will do it for him.

Are you content ?

The bail-piece is left at the judge's chambers until bail be perfected.

The special bail-piece above-mentioned, is in the following shape and form :

Easter Term, in the 32d year of the reign of king Geo. the 3d. Stormont and Way.

Middl. sex, } A. B. is delivered to to wit. } bail on a capi corpus, to

C. D. of Cheapfide, London, mercer, and

E. F. of Newgate-street, London, hatter,

T. S. attorney, Sworn to At the suit of 5ool J. K. 4th May, 1792.

And the clerk of the bails of K. B. must mark the bail pieces numerically as they are received. R. Trin. 30 G. 3.

If the suit be by original, bail is taken by the filazer, as in C. B.; which mode of proceeding see opposite.

be occasion to sue the bail on their recognizance.

But in the filazer's absence, or if he cannot attend, the recognizance may be taken without him, before a judge, on a piece of parchment, stamped with a double 12d. stamp. R. H. 8 G. 2.

This is then called a bail-piece, and is as follows :

In the Common Pleas.

Easter Term, in the 32d year of the reign of king Geo. the 3d.

Middlesex, (ff.) Capias against A. B. late of Westminster, yeoman, at the suit of C. D. for 2ool. upon promise returnable in three weeks of Easter.

T. S. attorney } Affidavit for for defendant. } 1ool.

Taken and } Bail are, E. F. acknow- } of Cheapfide, London, hatter; and G. H. of Ludgate-hill, London, mercer. The defendant bound in 2ool. each of the bail in 5ol.

If the action be at the suit of a privileged person, the prothonotary's clerk will attend the court or judge.

Pay filazer, in term, 12s.; in vacation, 10s.; if taken at the judge's house, 3s. 4d. more.

Form of the Recognizance.

You (naming the defendant, if present) do acknowledge to owe the plaintiff 2ool. (being double the sum sworn to). You (naming the bail) do severally acknowledge to owe unto the plaintiff the sum of 1ool. a-piece, to be levied upon your several goods and chattels, lands, and tenements, upon condition, that if the defendant be condemned in the

Of Bail to the Action, or Bail above.

the said action, he shall pay the condemnation money, or render himself a prisoner to the Fleet for the same; and if he fail so to do, you (naming the bail) do undertake to do it for him, R. 5 W. & M.

If the defendant be not present, and does not enter into the recognizance, then the bail are bound in double the sum the cause of action is sworn to amount to; otherwise only in the sum sworn to, and the principal in double the sum.

Memorandum of warrant necessary.

But both in B. R. and C. B. every attorney, at the time of putting in bail, must deposit in the hands of the judge's clerk, the memorandum or minute of his warrant to defend, stamped with a 2s. 6d. stamp, which the judge's clerk is to receive gratis, who is to deliver over the same to the proper officer, agreeable to 25 G. 3. c. 80. s. 25.

How if defendant held to bail by a judge's order.

If defendant is held to bail by a judge's order upon an affidavit, such affidavit should, in B. R., be left at judge's chambers; and in C. B. be filed with the filazer for the county where writ issues, who will mark on bail-piece the sum for which bail is given.

Of the notice of bail having been put in.

Bail having been put in, it is necessary to give notice thereof, without delay, to the plaintiff, or his attorney. R. M. 16. c. 2.

Where bail are put in, in due time, the defendant is not bound to give notice, but the plaintiff must search in the filazer's book.

Which notice is in the following form:

Otherwise if they be not put in in due time. Dawkins v. Reed, 1 H. Blac. 529.

*In B. R. A. B. plaintiff,
and*

*In C. B. A. B. plaintiff,
and*

C. D. defendant.

C. D. defendant.

Take notice, that special bail was this day put in (if by original, say, put in with the filazer for the defendant, &c.) for the defendant in this cause, before the Honourable Mr. Justice Buller, at his chambers in Serjeant's Inn, Chancery-lane, London; and the names are, C. D.

of

Take notice, that special bail was this day put in, with the filazer, for the defendant in this cause, before the Honourable Mr. Justice Gould, at his chambers in Serjeant's Inn, Chancery-lane, London; and the names are, E. F. of Cheapside, London, batter, and G. H. of Ludgate

gate

Of putting in Special Bail.

*of Cheap-side, London, mercer, gate bill, London, mercer. Dated
and E. F. of Newgate-street, the 4th day of May 1792.
London, batter. Dated the 4th
day of May 1792.*

Your's, &c.

Your's, &c.

*Tho. Smith, attorney,
for defendant.*

*Tho. Smith, attorney
for defendant.*

*To Mr. A. B. attorney
for plaintiff.*

*To Mr. A. B. Red Lion-street,
attorney for Clerkenwell.
plaintiff.*

*If they are the same as the
bail to the sheriff, then add—
“and they are the same as are
“bail to the sheriff.”*

(A. 2) *Of the Time and Manner of putting in Bail before a
Commissioner in the Country.*

(A. 2)

Formerly, special bail could only have been put in before a judge in town, which often occasioned, in country causes, great expence and inconvenience.

But by 4 & 5 W. & M. c. 4. the chief judges of the courts are empowered to appoint commissioners in the respective counties of England, for the purpose of taking recognizances of bail in causes commenced in the superior courts.

Which are to be taken in the same manner, and by such recognizances and bail-pieces as the judges themselves take them; when taken, they are to be transmitted to the court where the action shall be depending.

An affidavit also is to be made, of the due taking thereof, by some credible person present at the time.

The commissioners are further authorised to take justifications of bail by affidavit, and to examine the bail upon oath as to the value of their estates.

The time when bail must be put in, in country causes, has been already mentioned (*ante*, A. 1); namely,

B. R.

C. B.

*In six days after the return of
the writ. R. M. 8 Ann.*

*If by original, 8 days, (i. e.)
4 days after the quarto die post.*

*In 8 days after the first
day of term, if writ returnable
the first return of the term; if
on any other return, then 8 days
after such return day. 30 G. 3.
R. Trin.*

*When bail to be
put in, in coun-
try cases.*

For an explanation of these rules, see Observations infra.

Take

Of Bail to the Action, or Bail above.

How bail to be taken. &c. before a commissioner.

Take a bail-piece, as before directed in town causes, properly filled up; and go with the bail to a commissioner of the proper court, who will take the recognizance, for which pay in B. R. 6s. in C. B. 2s.; you may carry also, at the same time, an affidavit of the justification of the bail, ingrossed on treble 6d. stamp paper, which may be sworn before the same commissioner, and which it is best to do at this time, in case there should not be time to send it after exception. Then take an affidavit of the due taking of such bail, made by some person present at the time, ingrossed on treble 6d. stamp paper, to be sworn before some other commissioner (not the same who took the recognizance, for the affidavit of justification and of the due taking the bail must not be taken before the same commissioner) after which annex the bail-piece thereto, and send them to the agent in town, that he may get it properly put in, (i. e.) allowed and filed within the time above mentioned. See the late rules of court to be observed by commissioners in taking affidavits of illiterate persons, and also how affidavits to be intitled, ante Sect. I. of this chapter, C. D.

The agent having received the same,

B. R.

Carries the bail-piece, and the affidavit of the due taking thereof, to the chambers of one of the judges of this court, and there files the same, together with the memorandum of the warrant to defend, agreeable to 25 G. 3. for the filing whereof he pays in term 5s. in vacation 6s.

If suit be by original in B. R. same modo taken as in C. B.

C. B.

Applies to a judge for his allocatur, for which he pays in term 5s. in vacation 12s. which he files with the filaxer of the proper county where the bail was taken; pay for filing thereof, in term or vacation, 6s.

Of the notice in such case.

When the bail is thus put in, and filed, the defendant's agent should give notice thereof to the plaintiff's agent, and at the same time send him a copy of the affidavit of the justification.

In B. R.

Between { A. B. plaintiff,
and
C. D. defendant,

Take notice, that the bail-piece in this cause, with the affidavit of the due taking thereof, was this day filed with the Right Honourable Lloyd Kenyon, at his chambers in Serjeant's Inn, Chancery-lane, London.—

Dated

In C. B.

Between { A. B. plaintiff,
and
C. D. defendant,

Take notice, that special bail was, on the 1st day of May instant, put in for the above-named defendant, before J. S. Esq. a commissioner appointed to take special bails in and for the county of B.; and the names are,

A. B.

Of putting in Special Bail.

Dated the 4th day of May 1792. *A. B.*, of Bedford, in the county of Bedford, clothier, and *C. D.* of the same place, farmer, which

Yours, &c.

T. S. agent for defendant.

To Mr. *W. H.* agent for plaintiff.

have been allowed by the Honourable Mr. Justice Gould; and the bail-piece, together with the affidavit of the due taking thereof, is filed with the filazer of the said county. Dated the 4th day of May 1792.

Yours, &c.

T. S. Agent for defendant.

To Mr. *W. H.* attorney, or agent for plaintiff.

OBSERVATIONS.

1. Upon the Time of putting in Bail in Town and Country, and of transmitting the Bail-piece.
2. Upon the Bail-piece and Recognizance.
3. Upon the Extent of the Liability of the Bail.
4. Upon the Notice of Bail having been put in.

Bail may be put in before the return of the writ after an arrest, but never before the arrest, without consent; for if plaintiff dislike such bail, he may cause defendant to be arrested, and a bail bond given to the sheriff in a regular way. *Huggins v. Bambridge*, Bar. 83.

In B. R. the four days allowed for putting in bail are reckoned *exclusive* of the return day; and where the fourth day is Sunday, the party has all the next day to put in bail.

So that if the latitat be returnable on Wednesday, the defendant may put in bail any time on the Monday. *Studley v. Sturt*, Str. 782.

Bail cannot be put in after final judgment. *Jackson v. Knight*, Bar. 92.

In C. B. also, the days allowed for putting in bail are reckoned in the same way; and the meaning of the rule of Trin. Geo. 3. mentioned above, is, that four or eight days, as it may be a town or country cause, *exclusive*, shall be allowed in *full term*; if therefore the *capias*, which must be returnable on a general return day, be made returnable on the *first* general return of any term, which is always before the first day of term, then the defendant shall have four or eight days *from the actual first day of term*;

I.
When bail may be put in, in town.

In B. R.

In C. B.
Explanation of the rule of Trin. 30 Geo. 3.

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term; but if the *capias* be returnable on the *second*, or any other return, which must necessarily fall in full term, then the defendant is only allowed four or eight days, as the case may be from such return day. As for instance; the first return of Michaelmas term is November the 3d, but the term does not begin till November 6; now if a *capias* in any town cause be on that first return, defendant will have till the 10th, being four days exclusive from the 6th, to put in bail; whereas if a *capias* be returnable on the second return, defendant would only have four days from *that* return day to put in bail.

What time allowed when bail taken before a commissioner in the country.

The same mode of reckoning also applies to the time when the bail is to be put in which has been taken before a commissioner. For by being put in, is not meant that it must be *taken* by the commissioner, but that the bail-piece must be actually *filed* within that time with one of the judges in the King's Bench, or with the proper filazer in the Common Pleas. *Rolfe v. Steele*, 2 H. Blac. 276.

So that the bail-piece, &c. should be sent up so as to be actually filed with one of the judges on the 6th day after the return of the writ, if proceedings be by bill; if by original, on the 8th day, or the bail bond may be assigned. Rules and Orders, K. B. 283. n. Imp. K. B. 166.

If the bail be acknowledged before a judge of assize, no affidavit is necessary upon the transmission, the clerk keeps the bail-piece and enters same in the judge's book on his return to town. Imp. K. B. 167.

R. 8 W. 3.
Commissioners
to keep books
of the bail.

Plaintiff to have
access to them.

How to except
to them.

Of transmitting
bail-piece.

By rule Trin. 8 W. 3. every commissioner is to have a book kept purposely for entering the names of the defendant and his bail, and of the plaintiff, and the time of taking bail, and the name of him by whom such bail shall be transmitted, and also the name of the attorney for the defendant. And plaintiff's attorney is to have liberty to repair to it for the names of the bail in order to inquire about their sufficiency, and if insufficient to except against them within twenty days after bail is transmitted and notice to plaintiff or his attorney of the taking thereof; and in that case defendant must put in better bail, or such bail must justify in open court or by affidavit before a commissioner.

By the same rule, notwithstanding the time of sending up and filing bail-piece within six days above-mentioned, it is ordered that bail taken within 40 miles of London shall be transmitted within eight days, and above that distance

Of putting in Special Bail.

distance within 15 days, unless all the justices shall be on their circuits, and then as soon as any of them return. This appears contrary to the practice above laid down: but see an explanation of this part of the rule in the Observations *infra*.

The rules of 8 W. 3. in B. R. & 10 G. 1. in C. B., which, *prima facie*, allow a longer time for the transmitting of the bail-piece, are often confused with the rules of 8 Ann. and 30 G. 3. above mentioned, settling the time for the putting in of the bail. But I conceive their operation to be perfectly independent. The rules of 8 W. 3. in B. R. & 10 G. 1. in C. B. only apply to those cases where bail is taken before a commissioner in a *vacation*, and there is a *length of time* between the taking thereof and the return of the writ, in which case they direct such recognizances as are taken within 40 miles of London, to be transmitted within eight days after the *caption* in B. R. and 10 days in C. B.; and if taken above 40 miles, in 15 days in B. R. and 20 days in C. B. and empower the judges to accept such bail. But when the bail is not taken by the commissioner in the *vacation*, or when there is not that length of time, then the other rules take effect, and the bail must be *put* in within six or eight days after the *return*, as above-mentioned. That this is the true construction of the statute, and that it only alluded to the transmitting of bail in vacation, appears from the provision in the statute—*unless all the judges be on the circuit, and in such case, as soon as any one is returned*—as all the judges are never on the circuit in term-time.

Explanation of
the rules 8 W. 3.
& 10 G. 1. & 8
Ann. & 30 G. 3.

It is to be observed, therefore, that when bail is taken before a commissioner in the *vacation*, and there is above 10 or 20 days, as the case may be, between the taking thereof and the time when it ought to be put in, such recognizances should be transmitted agreeable to the above rules, 8 W. 3. & 10 G. 1. within the 10 or 20 days, as the distance may be, and when transmitted to the judge for his allowance, notice thereof should be given to plaintiff's attorney.

But in general practice this part of the stat. 8 W. 3. seems obsolete, and the rule appears to be that the defendant in all country causes shall have six days next after the return of the writ to acknowledge, file, and give notice of bail, and no more, however distant the country

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in which he resides may be. Notes on Rules and Orders in K. B. 283.

2. *Of filling up the bail-piece.* The name of the county in the bail-piece should be the same as that in the writ.

In the Common Pleas, bail are bound in a sum certain; but in the King's Bench they are not bound in a sum certain (except the action be by original), but only undertake that the defendant shall pay the condemnation-money, or render his body to prison, and the recognizance being general, must be reduced by the judgment to a certainty. Salk. 102.

Whether it may be amended. If the bail-piece be taken, and mistake be made in the name of the cause, as *Furrers v. Cooke* instead of *Farrers v. Cook*, court will not amend it, unless bail consent. *Farrers v. Cooke*, 1 Barn. 214.

A recognizance of bail was ordered to be amended, by making it, in an action of trespass and assault, ad damnum of 2000l. instead of 200l. on assumpsit; two actions were depending between the parties, and bail was put in to the action of assumpsit before the bail now amended was put in, which was intended to have been in the action of assault, but by mistake of the filazer was taken in the other action, contrary to the instructions given. *Faget v. Vanthiennen*, Bar. 59.

3. *Of the extent of the liability of the bail.* Formerly it was the practice of the court, that if a man became bail for another in any sum of money, as 10l. he was thereby bail in all actions brought in the same term by the same plaintiff against that defendant, let the sum be ever so great. 6 Mod. 266.

This was, as C. J. Holt himself acknowledged, an extraordinary and most inconvenient practice; to rectify which, a rule was made, that where the plaintiff recovered a greater sum than was laid in the action, the bail should not be chargeable *in ista actione*. By the construction of this rule, the opposite extreme was fallen into; so that if a plaintiff brought an action, with an ac etiam for 40l. and recovered 100l.; the bail, agreeable to C. J. Holt's opinion, was not liable at all, even for the 40l.; for he held, that the recognizance was to answer the condemnation, and since that could not be, he was bound to nothing. *Genbaldo v. Cognoni*, Salk. 102.

This practice was surely as extravagantly favourable, as the former was rigorous towards the bail.

Not, however, that the doctrine laid down by C. J. Holt, seems to have been altogether adhered to; for in the

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the case of *Wells v. York*, it was agreed to be settled by the court, that on a declaration of 200l. the bail was liable to all actions made under the same sum, but not to actions above that sum. 3 Keb. 16.

But the extent of the liability of bail on their recognizance, during the reigns of Car. 2. William, Ann, & 1 G. seems to have been a matter of much doubt; the question being, Whether, if the plaintiff recovered a greater sum than in the *ac etiam*, the bail should be answerable to the sum mentioned therein, or be wholly discharged. The case of *Martin v. Moor*, at length, settled the point, upon the grounds of reason and justice; the sum sworn to was 80l.; plaintiff recovered 104l.; court resolved, that as, on the one hand, there was no colour to subject the bail to more than they were bound, let the plaintiff's demand be ever so great; so, on the other hand, there was no reason the plaintiff should suffer by his moderation in taking bail, but the recognizance should be considered as an agreement to pay 80l. or deliver up the defendant; and therefore they made a rule, that the goods of the bail taken in execution, should be delivered on the bail's paying the 80l. and the costs, or else the goods to be sold, and the surplus returned. Str. 922.

Agreeable to which is the case of *Jackson v. Hassell*, Do. 330.

Indeed there is an express rule of court to this effect, East. 5 G. 2. K. B. That where the plaintiff declares for or recovers a greater sum than is expressed in the process on which he declares, the bail shall not be discharged, but be liable for so much as is sworn to and indorsed on the said process, or for any lesser sum which the plaintiff in such action shall recover.

So that bail above are not liable upon this recognizance beyond the sum *sworn* to and the costs, let the plaintiff recover ever so great a sum.

As to the liability of the bail below on the bail bond, or of the sheriff on an attachment, see post, Sec. 7. B. and Sec. 8. C.

Bail, when put in, are either *absolute* or *de bene esse*. They are absolute, when the plaintiff consents to and approves of them in the first instance. They are *de bene esse*, when put in without such consent; i. e. *conditionally*, provided no exception be made against them.

When put in *de bene esse*, notice of their being put in should be given in B. R.; but not necessary in C. B. if

4.
Of the notice of bail having been put in.

When necessary,

put

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put in, in time; but otherwise, it is. *Dawkins v. Read*, 1 H. Blac. 529.

What it should contain.

This notice should be properly entitled, Loft. 237. and particularly specify the names of the bail, Id. 187. their degrees, Id. 281. their trade or vocation, Id. 187. 6 Mod. 24. and not merely the parish or town, but the very street or place where they live, Loft. 72. 194. in order that the plaintiff may the more easily find them out.

In B. R. if the same bail as were given to the sheriff become bail above, it is usual to mention, that they are the same in the notice, because they cannot in this court be excepted against, but they may in C. B.; therefore, in that court, there is no need to mention this circumstance.

Of the origin of bail, &c. *bene esse*, and of the former practice in this respect.

Formerly notice of putting in bail was given before bail were acknowledged, for after the recognizance was taken they became absolute; accordingly we find a rule of court, Mich. 7 Jac. 1. ordering defendant's attorney not to put in bail before notice given to plaintiff's attorney on pain of expulsion from his office. And by another rule, Mich. 21 Car. 1. 1645. the plaintiff's attorney on receiving such notice is ordered to attend before the judge to accept or except to such bail. But afterwards the practice of putting in bail *de bene esse* was introduced, and notice thereof given to plaintiff and time allowed for exception. And by rule Mich. 16 Car. 2. 1664. every attorney who shall put in any special bail *de bene esse* upon a *cepi corpus*, shall give notice thereof without delay to plaintiff or his attorney, who must except thereto within twenty days, or within four days after such bail may be filed.

(B)

(B) Of accepting Bail, and filing the Bail-piece.

The bail, when put in, must be either *accepted* or *excepted* to by plaintiff.

If the bail are *accepted*, it only remains for the defendant's attorney to file the bail-piece, which must be done within *twenty* days after. R. T. 13 Car. 2.

In B. R.

When the suit is by bill, and the bail are accepted, the bail-piece is taken and filed with the signer of the writs, for which is paid 4d.; if by original, it remains with the filazer.

In C. B.

If the bail are accepted, the bail-piece is filed with the filazer.

Of filing the Bail-piece.

The same practice prevails in country causes, when bail was taken before a commissioner.

If excepted to, bail-piece ought to be filed within twenty days after justification. Tr. 13 Car. 2. B. R. Mich. 6 Geo. 2. C. B.

OBSERVATIONS.

In C. B. the judges in the treasury refused to order a bail-piece to be filed, *twenty* days being elapsed since the caption; the rule being in such case, that it shall not be filed without leave of the court. But the court being moved afterwards, upon the affidavit of defendant's agent that he received the bail-piece in due time, but that it was omitted to be filed by his clerk's neglect, they ordered it to be filed. *Aucher v. Hamilton*, Bar. 65.

If the bail-piece not filed in time, court will, in certain cases, permit it to be filed afterwards.

Every bail taken before or upon the *continuance* day, shall be a bail, and filed of the preceding term; and every bail taken *after* the continuance day, shall be a bail, and filed of the subsequent term, and not otherwise; but where any new bail is added to any other bail taken on or before the continuance day, the same shall be taken and filed as of that term in which the bail was first put in. *Gilb. Prac. B. R. 341. Same in C. B.*

Of what term the bail shall be.

If defendant neglects to file the bail-piece, and plaintiff wants afterwards to sue on the recognizance, he may file it himself, which is often done; but if defendant is rendered in discharge of his bail, he must file it in order to get an exoneretur marked on it; as will be shewn in the next section.

Why bail-piece must be filed.

Formerly if bail were not excepted to within time, viz. *twenty* days after notice, affidavit was made by defendant of the service of notice of putting in bail, upon the back of the bail-piece, which was then filed with the master, for which no fee was paid. *R. M. 16 Car. 2.*

How defendant may get it filed if bail not excepted to.

But at this day it is not usual for attornies to make affidavit of the service of notice of bail after the expiration of the twenty days and no exception entered. The intention of that rule was to compel the payment of the fee due to the master on filing the bail-piece; but by the rule of East, 29 Car. 2. which ordered the fee to be paid at the time of putting in special bail, that purpose was answered; and by a subsequent rule Mich. 8 Ann. it is ordered generally, that an exception to bail is void unless made within twenty days after notice, which rendered

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the rule of 16 Car. obsolete, and any affidavit unnecessary on the filing of the bail-piece.

(C)

(C) Of excepting to Bail.

If plaintiff disapprove of the bail put in, he is at liberty to except to them, which exception must be made

In B. R.

When, and how such exception is to be made.

Within twenty days after notice given of putting in bail, otherwise void. R. M. 16 Car. 2. R. M. 8 Ann.

It must be in writing in the judge's book before whom bail was taken. The form of the entry is, "I except against these bail."

T. S. plaintiff's attorney.

After exception made, notice thereof, in writing, must be given to defendant's attorney, which is as follows:

A. against B. I have excepted against the bail put in for defendant in this cause.

Your's, &c.

T. S. plaintiff's attorney.

To Mr. A. B. attorney for defendant.

If the suit be by original, it is the same practice as in C. B.

In B. R.

In country causes, when Bail taken before a Commissioner:

The bail must be excepted to the same as above, within twenty days after notice of bail being filed at the judge's chambers and notice of such exception must be given to defendant's agent in town. R. T. 8 W. 3.

In C. B.

** Same time as in B. R.*

It must be in writing in the filaxer's book, or on the bail-piece.

Same notice in writing necessary in C. B.

In C. B.

The same as above. Exception to be made under the bail-piece left at the filaxer's, and notice thereof given to plaintiff's agent in town.

OBSERVATIONS.

- (C. 1) *On the Time of excepting.*
- (C. 2) *On the Manner of excepting, and the Notice thereof.*
- (C. 3) *On the Grounds of Exception, and what are good.*
- (C. 4) *What shall be deemed a Waiver of Exception.*

Of excepting to the Bail.

If plaintiff thinks the bail put in, or transmitted, insufficient, he may except to them, and thereby oblige them to appear, and justify by swearing themselves *house-keepers, and worth double the sum* for which defendant was arrested, after their own debts are discharged. (C. 1) Of the time of excepting.

If bail are not excepted to within the *twenty* days, the bail become absolute; and the bail-piece may be *filed*; 20 days, Must be within 20 days, see *ante*, B. If excepted to, defendant must perfect his bail within four days after exception taken.

If the last day of the *twenty* be Sunday, exception and notice on the Monday will be good. *Oldham v. Burrell*, 7 D. & E. 26.

An exception entered after the expiration of the twenty days, is of no validity. or not good.

Though bail be irregularly put in, if notice thereof be given, and no exception made within *twenty* days, they shall stand.

Thus where a *capias* indorsed for bail being issued, defendant, previous to the return of the writ, and to his being arrested, put in bail before a judge, and gave notice thereof to plaintiff's attorney, plaintiff regarded not the notice, but caused defendant to be arrested; and he being in custody, moved for a *superfedeas*, and had a rule to shew cause. It appearing that plaintiff had not excepted against the bail within twenty days after notice thereof, the court was of opinion that the bail ought to stand, and the rule was made absolute. *Huggins v. Cambridge*, Bar. 81. Bail irregularly put in, if not excepted to, will stand.

Exception to bail must not only be within due time, but also before any step is taken by plaintiff, which may be construed a waiver of exception. For which see post, C. 4. of this section.

(C. 2) *Of the Manner of excepting, and the Notice thereof.* (C. 2)

The manner of making the exception, and of giving notice, has been shewn above, C.; and it is necessary that both should be done; the one without the other is insufficient; nor will a *verbal* notice be good. *Satchwell v. Lawes*, Bar. 88. *Goswell v. Hunt*, Bar. 101. *Caf. of Prac. C. B.* 33. *R. East.* 5 G. 2. Verbal notice not good.

And not only the exception must be made, but the notice thereof must be given *within the twenty days*; for an exception without notice is as no exception. *Oldham v. Burrell*, 7 D. & E. 26.

Of Bail to the Action, or Bail above.

Unless defendant proceeds afterwards.

But if plaintiff gives a verbal notice of exception to defendant, or no notice thereof, and defendant afterwards proceeds by giving notice of justification, he has waived the irregularity with respect to *himself*; but it is not waived as relating to the *sheriff*. No attachment therefore will, in such case, lie against the sheriff. *Cohn v. Davis*, 1 C. B. T. R. 80. *Rogers v. Mapleback*, 1 C. B. T. R. 106.

Unless the utmost regularity therefore be preserved in the exception and notice, the plaintiff will lose his remedy against the sheriff. See post, Sec. 8. B.

(C. 3)

(C. 3) *Of the Grounds of Exception.*

As the same objections to the bail, which would be reasons for *excepting* to them, would also be good grounds for *opposing* the bail at the time of their justification, we shall, to avoid repetition, consider them under the last head; for which, see post, D. 3.

If bail below become bail above, they cannot be excepted to in B. R. Otherwise in C. B.

Bail, however improper, will stand, unless excepted to.

But it may be proper here again to mention, that in B. R. if the bail *below* become bail *above*, you cannot except to them; but in C. B. you may. See more on this head, and also how plaintiff, in such case, should proceed in B. R. post, Sec. 7. D.

It is also to be observed, that if improper persons be put in as bail, though even excluded by any rule of court, yet that does not render the bail-piece *ipso facto* a nullity; but it is still incumbent upon plaintiff, if he disapprove of them, to except regularly to them, for otherwise he waives the objection, and they will stand good; nor can he take an assignment of the bail-bond, and proceed as if no bail were put in. Do. 467. n.

(C. 4)

(C. 4) *What shall be deemed a Waiver of Exception.*

Declaration is a waiver, unless delivered de bene esse.

If plaintiff, after special bail be put in, and before any exception, deliver a declaration *in chief*, (for the meaning of which see the next chapter,) or declares generally, *i. e.* without indorsing his declaration, as filed or delivered *de bene esse*, or conditionally, in which case it will operate as a declaration in chief, it is a waiver of the bail, and of exception thereto. So, if after exception, and before justification, he declares, as above-mentioned, it is a waiver, and the bail need not justify. *Friend v. Mullens*, Cas. of Prac. C. B. 81. *Walsh*, assignee, v. *Hadcock*, lb. 156. R. M. 8 Ann. (C.) B. R.

But

Of excepting to the Bail.

But he may declare *de bene esse* or conditionally, *i. e.* if before bail put in, conditionally, until good bail be put in; if after, until the bail put in do justify. *Lister v. Wainhouse*, Bar. 92.

The declaration should, in such case, be marked *de bene esse* or conditionally. *Mayo v. Weaver*, Bar. 105.

Nor must he take any further step in the cause until the bail be put in, or have justified, as the case may be; for if he demands, or accepts a plea, that will operate as a waiver. *Lister v. Wainhouse*, Bar. 92.

In C. B. where the bail below are put in as bail above, taking assignment of the bail bond is not a waiver of the exception. *Claxton v. Hyde*, Bar. 90. P. Reg. 68.

But otherwise in B. R. R. M. 8 Ann. Sal. 97.

So demanding or accepting a plea, is a waiver.

When taking assignment of bail-bond is not a waiver.

(D) Of perfecting Bail.

(D)

When bail are excepted to, and due notice of such exception given, it is necessary that bail should be *perfected*; to do which they must appear in open court, and swear that they are housekeepers, and are worth, after all their debts are paid, double the sum they are bound for; and this is called *justifying*. If the same bail which have been already put in, cannot, or will not justify, other bail are to be *added*, *i. e.* put in, in their stead, who must justify. Should the circumstances or characters of the bail be suspicious, plaintiff may, at the time when they are justifying in court, examine and interrogate them accordingly; which is called *opposing* bail, and which is done to induce the court to reject them. But should no such opposition be made, or notwithstanding such opposition, the court should still suffer them to justify, it only remains to get them *allowed*, and the bail are then said to be *perfected*. Under this head, therefore, of *perfecting* bail, it will be necessary to consider the mode of *justifying*, *adding*, *opposing*, and *allowing* bail.

What it is,

In B. R.

If exception be entered, and notice given in term time, bail must justify in four days after such notice, or other bail added, who shall justify within the said four days; but if exception be entered in vacation, then the bail shall justify upon the first day of the subsequent term. E. 5 G. 2.

Two

In C. B.

Same as in B. R. R. Trin. 3 & 4 G. 2. & 8 G. 3.

When bail must justify.

Is

Of Bail to the Action, or Bail above.

What notice necessary.

Two days notice must be given when the bail are to justify, unless the same bail as were put in are to justify, then one day's notice of justification is sufficient, (i. e.) on the 12th for the 13th.

How to justify in court.

When bail justify in court, go the evening before to the clerk of the judge before whom bail was taken, and desire him to bring the bail-piece into court the next day, who will do so accordingly; or get it of him yourself and bring it into court; pay him 2s. 6d.; prepare an affidavit of the service of notice of justification, and get it sworn; indorse it with the names of the parties, and give it to the counsel, with 10s. 6d. to move to justify the within bail. Your bail are then brought into court, and sworn; pay 9s. and a rule is drawn up in the evening by the clerk of the rules for the allowance of the bail, for which pay 4s., a copy whereof must be served on plaintiff's attorney. The bail-piece should afterwards be obtained from the judge's chambers, and filed with the master.

If bail are to be added, how to justify.

If the bail put in cannot, or will not justify, and others instead of them are added to justify, two days notice must be given, that is, on the 12th for justification on the 14th. Sunday is no day; therefore notice on Saturday for Monday is not a good two days notice. So if one fresh bail be added in lieu of one of those before put in, and the notice is accordingly.

Bail are added, by going before a judge, and putting the names of such fresh bail on the bail-piece in B. R. and in the filaxer's books in C. B. They may be added the same morning you justify, having given two days'

In C. B. two days notice, whether the same bail, or additional ones—exclusive, as in B. R. (i. e.) one exclusive, and the other inclusive. Notice 12th for 14th.

When bail justify in court, having got sworn affidavit of service of notice, for which pay 2s.; desire the filaxer to attend at Westminster with the bail-book or bail-piece; pay him 5s. 4d.; give your affidavit to a serjeant to move to justify the bail, with a fee of 10s. 6d. and call in and swear your bail; pay 3s. 6d.; and get the rule for the allowance of the bail at the Secondaries office, pay 4s. 6d. serve plaintiff's attorney with a copy, and shew the original rule at the time.

When bail are to be added, take them to the judge's chambers with the filaxer; pay for adding 7s. 4d. and then justify as above.

Of justifying, adding, and perfecting Bail.

days' previous notice of such intended added bail and of their justifying; for each bail added, pay 2s.; and judge's clerk, for bringing bail-piece into court, 2s. 6d. The bail-piece is given to the master in B. R.

The added bail must justify in court within the four days after exception, without waiting for any new notice, for the plaintiff need not except again to such new bail; but if they do not justify, may proceed on bail-bond. When added, bail must justify,

You may put in bail and justify at the same time, by giving notice for that purpose two days exclusive previous thereto; which is done as follows: Fill up a bail-piece, take it to the judge's clerk at Serjeant's Inn, who will take the recognizance; pay 4s. and 2s. 6d. for delivering it to the master in order to justify; have affidavit of service of notice ready, which give to counsel to move. How bail may be put in and justified at the same time.
Imp. B. R. 161.

It is to be observed, that whenever bail justify in open court, the plaintiff may, by counsel, oppose such bail, by examining them as to their sufficiency or competency. For which see *infra*, D. 3.

But where there is a confidence between the attornies, they may consent that the bail shall justify at a judge's chambers, for which pay 2s.; and 10s. 6d. used to be paid the plaintiff's attorney for such consent; but the court always reprobated the practice, and Lord Kenyon has at length put a stop to it. May justify by consent at judge's chamber's.

In B. R.

Notice having been given of bail being duly filed, and a copy of the affidavit of justification sent, if plaintiff excepts to them, notice of justification must be given as before, only the words "by affidavit" added.

Affidavit of the service thereof must be made, and the affidavit of justification and bail-piece being carried to Westminster, either by the attorney, if not filed, or by the judge's clerk, if it is; counsel must move to justify. The affidavit is then read in open court, for which pay 9s. and afterwards the rule for allowance is made out, for which 4s. is paid.

In C. B.

Same as in B. R. as to notice of justification, &c. only in this court, speak to filazer to bring down the affidavit to Westminster; pay him 3s. 4d. and court fees; on justification, 3s. 6d.; get the rule for allowance, and serve it on plaintiff's agent.

How to justify bail taken in the country before a commissioner.

In both courts, the usual way amongst fair practitioners is, to accept the justification by filing the affidavit with the judge's clerk
in

Of Bail to the Action, or Bail above.

in B. R. and the filazer in C. B. at the time of filing the bail-piece; if not done then, to accept it by filing the affidavit afterwards with the proper officer.

OBSERVATIONS.

(D. 1) *On the Time and Manner of justifying and adding Bail.*

(D. 2) *On the Nature of Justification.*

(D. 3) *On opposing Bail, and what are good Grounds of Opposition.*

(D. 4) *On the Exoneretur, and of striking the Bail out of the Bail-piece.*

(D. 5) *On the allowance of Bail.*

When bail must justify.

It has been observed, that the time in which bail are to justify is four days after notice of exception, if there are four days in the term; if not, or if exception be in vacation, then on the first day of the next term.

It was formerly doubted in C. B. whether defendant should not have the first four days of the succeeding term to justify in, when exception was made to bail in vacation; and indeed that time was usually allowed. Bar. 79. 101. 111. 115. But it is now settled, that he must justify *as in B. R.* on the *first* day.

Of the four days allowed to justify, one is exclusive and the other inclusive. So that, if exception be on Wednesday, an attachment cannot issue till the Tuesday; for Sunday being the last day of the four, the bail have all Monday to justify. In C. B. *North v. Evans*, 2 H. Blac. 35.

If bail are suffered, by plaintiff's negligence, to justify, though after the expiration of the four days, and are allowed, plaintiff cannot move for an attachment, because he must swear that bail are *not* put in and *perfected*.

Bail cannot justify after the rule upon the sheriff to bring in the body is expired. *Overton's case*, Mic. 26 G. 3. Imp. K. B. 169.

When bail must be added.

Where fresh bail are added, it should be done within the time allowed for their justification, and they must actually become bail before the delivery of the notice of justification to plaintiff's attorney. R. M. 18 G. 3. C. B. *Collier v. Godfrey*, 1 H. Blac. 291.

When added, bail must justify.

After an exception to bail put in before a judge, defendant *added* bail, but did not justify in court pursuant

Of justifying, adding, and perfecting Bail.

to the rule for perfecting bail in *four* days; plaintiff proceeded on the bail-bond without excepting against the bail, and held regular. *Gregory v. Gurdon*, Bar. 74.

Formerly if bail were not present at the sitting of the court, they used to wait till its rising; and then, unless opposed by counsel, their justification was a matter of course, upon the judge's clerk attending with the bail-piece, or filazer with his bail-book. But now it is not a matter of course, although sometimes allowed on special application. In general when the bail do not appear upon being called, but are prevented from attending, application is made for further time to justify, which the court often grants; but in such cases when the bail are afterwards brought up, an affidavit must be made alledging the reason of their former absence, which must be produced and read before they are permitted to justify. And whenever further time is allowed, the rule should be drawn up and served as notice thereof on plaintiff's attorney.

How if bail be not present at the sitting of the court.

Bail may justify before a judge at his chambers, by consent of plaintiff or his attorney; but otherwise the justification, if in London or Westminster, or within 10 miles thereof, is in person, in open court, at Westminster; but if beyond that distance, by affidavit before a commissioner; as see *ante*, D.

Where bail are to justify.

And this affidavit should be formal and explicit.

An affidavit of justification, stating that the bail were severally worth the sum wherein they were bound by their recognizance, after all their *just* debts were paid and satisfied, was held insufficient; it not being in common form: the word *just* ought to be omitted. Bar. 67.

Of the affidavit of justification. in country causes.

Yet in B. R. it is regular, I believe, to swear bail is worth, &c. after all his *just* debts are paid.

But further time is only applied for when the time allowed for putting in and justifying bail has expired; for otherwise defendant, without any such application, may continue his notice, or give fresh notice of justification for the next morning, if the same bail; if first bail, it must be two days notice: but if the original time of justifying will be out before such fresh notice expires, the court must be applied to enlarge the time, or an attachment may go.

The bail, who resided in the country, had entered into a recognizance before a judge in town; and being excepted

Of Bail to the Action, or Bail above.

cepted against, sent up an affidavit of sufficiency, which was allowed, no opposition being made by plaintiff thereto. Bar. 102.

If any opposition is made to justification of country bail, it should be by affidavit, stating the frauds.

If the affidavit be positive and thought sufficient, bail are rejected. Sometimes however the court will give further time to put in other bail.

When it should be sent up.

But in a country cause, it is often impossible to justify, &c. within the four days; therefore it is usual to send up an affidavit of justification along with the bail-piece; vid. ante, (A. 2); but if that is not done, application must be made for time to justify.

Summons for further time.

So in other cases, as in adding bail, &c. if the attorney be pressed for time, he may take out summons for further time.

What a defendant in custody, must do to get discharged.

If defendant goes to gaol before return of writ for want of bail, he must put in and perfect bail above, before he can get discharged; but, when perfected, he may be discharged on summons.

How if in vacation.

If he happens to be in custody in a vacation, as if he be surrendered in vacation and fresh bail are ready to appear for him, or if no bail can be found at the time of arrest, but afterwards they come forward, which may be after writ is returnable and in vacation, in such cases, his bail may justify at a judge's chambers, and plaintiff may oppose them there; this being an exception to the general rule, that bail cannot justify at a judge's chambers without consent, as defendant would otherwise, from plaintiff's obstinacy, be incapable of getting discharged until the first day of term.

Bail must be justified at the place mentioned in notice.

Defendant gave notice to justify in court, and instead thereof, did so at a judge's chamber, and was then surrendered to the Fleet; held insufficient, and rule to stay proceedings on bail-bond discharged. *Cremer v. Bulman*, Bar. 67.

A defendant was committed to the Fleet for endeavouring to bribe the plaintiff's attorney not to appear against him on justifying bail. *Cas. of Prac. C. B. 88.*

When further time will be allowed for justifying.

Where the bail do not attend, or are not permitted to justify on account of a defect in the notice of bail or justification, the court will, in general, allow them further time to justify. But where they are rejected, on account of some personal insufficiency, the court will seldom

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seldom allow further time to add and justify others; and if the bail do not justify at the time appointed, and no further time is given, they are out of court. Tid. 142. Loft. 72. 187. Per Cur. M. 25 G. 3. T. 24 G. 3.

But the usual way, in case the bail, through the hurry of the business of the court or otherwise, do not justify on the day mentioned in the notice, is, to give another notice that the bail will justify the next morning, and to make another affidavit of service of notice, and to attend with the bail to justify accordingly.

(D. 2) *Of the Notice of Justification.*

(D. 2)

In B. R. if plaintiff except to bail, defendant may give notice on Monday to justify on Tuesday, provided the same bail mean to justify, as have been already put in; for it is presumed plaintiff has made the proper inquiry in regard to their sufficiency before he excepts. But if new bail are added, then notice on Monday must be for Wednesday. So if only one fresh bail be added, there must be two days notice. What time requisite.

In C. B. whether the same bail, or fresh bail, two days notice, *i. e.* Monday for Wednesday, must be given. Bar. 82. 88. But Sunday is no day; so that notice on Saturday for Monday would be bad. *Gregory v. Reeves*, Bar. 303.

If the exception be entered and notice thereof given so late that four days do not remain of the term, or if it be in vacation, the defendant must justify his bail upon the first day of the following term, in which cases it is sufficient if he give notice of justification two days before the commencement of the term. N. on Rules and Orders of K. B. 246.

The notice of justifying bail should particularly express the names of the bail. What it should contain.

A notice that A., B., and C., or two of them, will justify, is bad. Loft. 26.

Notice that three will justify, is irregular. You may as well give notice of threescore, and send plaintiff to inquire all over London. *Allen v. Key*, Blac. Rep. 1122. C. B. sed aliter per Loft. 252. in B. R.

In B. R. in Hilary term 7 G. 3. in a cause, *Smith v. Trinder*, bail were to justify in 4000l.; and court suffered one

Of Bail to the Action, or Bail above.

one bail to justify in 4000l. and two other bail in 2000l. each.

If one bail be added, and one of the original bail justify at the same time with that added, vary the notice according to the fact.

A notice given in the name of one of the plaintiffs only, where there are joint plaintiffs, is bad. *Loft. 237.*

If defendant changes his attorney without leave of the court, and gives notice of justifying bail by his new attorney, it is irregular, and plaintiff is not bound to accept such notice. *Kaye v. De Mottos*, Blac. Rep. 1323. Do. 217.

Bail, though the same as were given to the sheriff, cannot justify without having given notice. *Anon. Barn. 31.*

How it must be served.

Copies of such notices must be served on plaintiff's attorney, by leaving same at his house with some one of his servants; and affidavit must be made by the person who serves notice of justification, which is afterwards annexed to the brief for moving to justify, and read in court; which affidavit must express in what manner such notice was served, as by leaving it with the clerk at his chambers, or the like; and if put through the door, it should state a subsequent acknowledgment of the receipt of it, or something tantamount.

Bail must become such before notice.

Before any notice of justification is given, bail must actually have become such, otherwise they will not be allowed to justify. *Collier v. Godfrey*, C. B. T. R. 291.

If bail do not justify on the day expressed in the notice, and no further time be obtained, they are out of court; and bail-bond may be assigned; nor can they surrender the principal. *Hardwicke v. Black*, 7 D. & E. 297.

(D. 3)

(D. 3) *Of opposing Bail, and upon what Grounds.*

Of the grounds of opposing bail,

When bail are about to justify, they may be opposed by plaintiff's counsel, the grounds of which opposition are various.

Sometimes it is a mere preliminary objection till the costs are paid: this may be done, whenever there have been three different notices of justification of different bail; in which case they may be prevented justifying until the costs of the trouble of inquiring after them are first

Of justifying, adding, and perfecting Bail.

first paid (generally 40s.); but if the notices were of the same bail, no additional trouble has been given; and therefore in such case there can be no opposition on this ground.

In some cases bail may be objected to on account of their profession or avocation.

by reason of
their profession
or avocation.

No attorney can justify as bail. R. M. 14 G. 2.

But a barrister may.

Nor an attorney's clerk. Cowp. 828. S. C. Doug. 450.

Though he is not an articled clerk. *Cornish v. Ross*, 2 H. Blac. 350.

Nor sheriff's officer, bailiff, or other person concerned in the execution of process; or the keeper of any prison. *Hawkins v. Magnall*, Do. 466. R. 14 G. 2.

Nor any of the Marshalsea-court officers; nor any sergeants at mace, nor other persons executing the process of any courts, although he may only be the summoning officer of the sheriff's court to warn juries, &c. *Bolland v. Pritchard*, Blac. 799.

This was held by Mr. J. Lawrence to apply only to officers of superior courts; and he permitted a person to justify, who was concerned in executing process in the Court of Conscience. Trin. T. 1794.

If defendant's attorney has promised to indemnify the bail, it is good ground for rejecting them.

Again, persons outlawed, after judgment, cannot be bail, nor any one convicted of perjury; and he may be even asked, Whether he has not stood in the pillory for perjury? *King v. Edwards*, 4 D. & E. 440.

Persons out-
lawed, or guilty
of perjury.

So a foreigner, if he had not property in England to the amount for which he is bail, is in B. R. objectionable. *Boddy v. Lyland*, Burr. 2526.

Foreigners.

Property in Scotland not sufficient; because not liable to the process of our courts.

But in C. B. the circumstance alone of the foreigner not having effects here, is not sufficient to reject him. *Smith v. Scandrett*, Blac. 444. Especially if defendant be a foreigner. *Christie v. Filleul*, Blac. 1323.

So it has been objected, that the bail live in the verge of the court; but this, without other suspicious circumstances, such as his being much in debt, and the like, is not sufficient. *Glead v. Mackay*, Blac. 956.

Living within
the verge.

It is a ground of opposition that the bail are not housekeepers, though it is of no consequence how trifling the

Not being
housekeepers,

Of Bail to the Action, or Bail above.

or worth double
the sum sworn
to.

If suspicious or
prevaricating in
their conduct.

If the proceed-
ings have been
irregular.

rent of the house is, or whether it is rated or not. Renting chambers in an inn of court above 10 l. *per ann.* is being a housekeeper. So bail will be rejected if they are deficient as to property in not being worth double the sum sworn to after payment of all their debts. Uncertificated bankrupts, or such as have been twice bankrupts, and not paid 15s. in the pound, are subject to this objection. Loft. 148. 328.

So if any suspicions arise from the conduct of the bail, as their having assumed fictitious or other people's names (a), for which they are liable to be put in the pillory; or their not knowing the defendant, or having frequently been bail before, without being able to say how often, or what sums, or in what actions, and the like.

The last ground of opposition which I shall mention is, any defect or irregularity in the proceedings, either in the notices themselves, of putting in, or of justifying bail, &c. or in the service thereof. See ante, D. 2.; or as to the time of the bail's justifying, for which see ante, D. 1.

(D. 4)

(D. 4) *Of the Exoneretur, and of striking the Bail out of Bail-piece.*

When bail are excepted to, and do not justify, but others are added who do, the names of the former bail still continue upon the bail-piece, until a rule of court be made for striking them out.

The use of the
exoneretur.

So that in order to get themselves discharged of their recognizance, they must move to be exonerated, and have their names struck out of the bail-piece, for which a rule will accordingly be made. *Fulke v. Bourke*, Blac. 462.

Bail were put in, and excepted to; afterwards two fresh bail were added, one of which only justified and the other was rejected; two days further time was allowed to put in another in the room of the rejected bail, in

(a) By stat. 21 Jac. 1. c. 26. s. 2. & stat. 4 & 5 W. & M. c. 4. s. 4. "If any person shall acknowledge, or procure to be acknowledged, any recognizance or bail in the name of another person, not privy or consenting to the same; or shall represent or personate another person before a commissioner, whereby he may be liable to the payment of any debt or damages, he shall, on conviction, suffer death without benefit of clergy."—To effect which conviction the bail-piece must be filed, 2 Sid. 90.; and after the offender is convicted, but not till then, proceedings will be set aside against the party personated. Tidd 140.

which

Of the Allowance of Bail.

which time defendant was surrendered, which was held regular; because as the two first bail were not struck out of the bail-piece, they were liable on their recognizance and competent to surrender. *The King v. Sheriff of Essen*, East. 1794. 5 D. & E.

If one person be excepted to as bail, and another be added, the name of the former may, with leave of the court, be struck out of the bail-piece at any time before scire facias; and even after scire facias brought, proceedings as to him will be stayed. *Waller v. Green*, Say. 309.

When bail may be struck out of bail-piece.

Bail excepted to, but not struck out of the bail-piece, may, if afterwards proceeded against, move to enter an *exoneretur nunc pro tunc*, which will be granted. *Humphrey v. Leite*, Bur. 2107. B. R.

Bail in error, who refuse to justify, may have their names struck out of the bail-piece at any time. 1 Wil. 337. B. R. *Jones v. Tub*, S. C. Say. 58.

When bail have once justified, if plaintiff should not like them, he must not discontinue by a side-bar rule, without disclosing the fact, and bring a new action; as, in such case, the court will discharge the side-bar rule: but he ought to ask leave of the court to charge the defendant in custody, disclosing the whole of the case to them. *Belchier v. Gansell*, Burr. 2502.

One who is a bail cannot be a witness in the cause for his principal; therefore if defendant shall have occasion to examine one of his bail as a witness, he must make an affidavit that such bail is a material witness for him in the cause, and thereupon move the court, that he may be struck out of the bail-piece, on adding and justifying another in his stead; but it will not be granted without an affidavit that he is a material witness. *Young v. Wood*, Bar. 69.

Of striking the bail out to make him a witness.

Sometimes bail have moved to enter an *exoneretur* on the ground of defendant having been sent out of the kingdom under the alien-bill, for which see post, Sec. 6. A.

(D. 5) *Of the Allowance of the Bail.*

(D.5)

It has been already observed, that after justification of bail, a rule for their allowance must be got of clerk of rules, with a copy of which plaintiff's attorney must be

How got.

Of Bail to the Action, or Bail above.

served, and the rule itself, at the same, time must be shewn to him.

The form of the rule is as follows :

Form thereof.

Wednesday next after ——— day of ——— in the 22d year of the reign of King George the Third :

*A. B. } Upon reading the affidavit of J. S. it is ordered, that
C. D. } the bail put in for the defendant, who have this day
justified themselves in court, be allowed, and the bail-piece filed on
the motion of ———. By the Court.*

The necessity of this rule.

Until this rule of allowance has been properly obtained, and served upon the plaintiff's attorney, bail is not perfected ; but an attachment may be sued out against the sheriff for not bringing in the body, nor will the court on motion set aside such attachment ; and this, although the plaintiff was present, and opposed the bail at the time of justification. *The King v. Sheriff of Middlesex*, 4 D. & E. 494.

This rule of allowance having been served, every thing has then been done, on the part of the bail, which is required by the practice of the court, and the bail are therefore said to be *perfected*.

SECTION VI.

Of the Surrender in Discharge of Bail.

Having shewn in what manner bail are to be put in and perfected, and also how such bail, by their recognizance, become answerable, either that the defendant shall pay the debt and costs which may be adjudged against him, or surrender himself to prison, or that they (the bail) will do so for him ; it may not here be improper briefly to consider the practice with respect to the surrendering of the principal in discharge of the bail, inasmuch as it may be made at any stage of the suit ; and in certain cases it is advisable for the bail to take this step, without delay, in order to get themselves discharged.

The surrender may be made either voluntarily, by the principal himself ; or compulsory, by the bail seizing the principal, and surrendering him ; and either in court, if fitting, or before a judge at his chambers—the last of which is most usual ; and the mode of making such surrender is as follows :

When

Of the Surrender in Discharge of Bail.

When defendant is at large,

In B. R.

Take defendant to a judge's chambers, and the judge's clerk will make out the committitur and surrender, and deliver him to the custody of the tipstaff, to be conveyed to the King's Bench prison; pay clerk 9s. 6d.; tipstaff 10s. 6d.

Notice of the render must be immediately given in writing to plaintiff's attorney, and an affidavit must be made before a judge of the service of the notice; carry affidavit to the judge's clerk or officer, who hath the custody of the bail-piece; who will take the same, and keep it as his voucher, and deliver you the bail-piece to be filed. The marshal (or gaoler) will also give you a certificate of the surrender (that defendant is in his custody), which the tipstaff generally brings with him, and gives to you at the time the render is made; pay for same 3s. 6d.; carry the bail-piece and certificate to the master, who will enter an exoneretur upon the former; pay him 2s. 4d.; leave the certificate with him to be filed; carry bail-piece to the signer of the writs, Mr. Webb, to be filed; pay him 4d.; this done, you enter the committitur and surrender in the marshal's book at the clerk of the judgments office, for which you pay 4d. and then render is complete.

Under the commitment must be added, the state of the cause at the time of surrender, viz. If before declaration, the sum sworn to on arrest; if declaration filed or delivered, to the sum sworn to, must be added—"De-

In C. B.

Get the filazer to attend at a judge's chambers with his book; bail are rendered therein, and the judge at the same time exonerates the bail, and delivers defendant to tipstaff to be taken to the Fleet; pay filazer 7s. 4d. tipstaff 10s. 6d. judge's clerk 13s.

Then give notice of such render to plaintiff's attorney; but as nothing further is to be done for the discharge of the bail, there is no need of any affidavit of the service.

N. B. The above is the mode when the proceedings are by original.

But if the action be by bill, or attachment of privilege, then bail-piece must be carried to the judge's chambers, by Mr. Sherwood, clerk of the dockets, &c. and exoneretur entered thereon; pay him 7s. 4d. tipstaff 10s. 6d. judge's clerk 16s.

Give notice as above, but no affidavit necessary. Imp. C. B. 504.

N. B. The above is the shortest way; but in the older books of practice, the same steps are directed to be taken in this court as in B. R. mutatis mutandis, with respect to the different prisons and officers of the respective courts.

How to surrender defendant in discharge of his bail.

Of the Surrender in Discharge of Bail.

"claration filed or delivered;"
 issue joined, or interlocutory judgment signed, as the case may be, after final judgment in debt, the debt and damages; and in other cases, quantum of damages.
 R. East. 8 G. 3. 1768.

When defendant is in custody :

If defendant be in custody of any sheriff at the suit of another plaintiff, or otherwise, the bail may have a *habeas corpus* either in term or vacation, directed to the sheriff or gaoler in whose custody he is, to bring them before a judge, returnable immediately, in order to render him in discharge of his bail. Burr. 1876.

Make out the *habeas*, as in other cases, vide *Hab. vol. 2d.*; lodge it with gaoler in whose custody defendant is; he will bring him into court, or to a judge's chambers, in order that he may render himself, or that his bail may do it; and the same steps must be taken by the bail to complete render, as where defendant is at large; only *habeas*, and return thereof, are left with judge, and return of *habeas* marked, or surrender signed by him; which is carried over to gaoler into whose custody defendant is rendered; attorney must get a tipstaff to carry him over to warden or gaoler. Tipstaff 10s. 6d.

OBSERVATIONS.

From the multiplicity of cases which may be found in the book; on the doctrine of surrender in discharge of bail, this point of practice at first appears obscure, and difficult to be understood: it may, perhaps, not a little tend to the elucidating of the subject, if it be treated under two distinct heads. First, the surrender of the defendant *before* judgment be obtained against him; and next, the surrender of the principal *after* judgment has been obtained against him.

For, although no proceedings can be had against the bail until *after* final judgment against the principal, yet they may surrender him, or he may surrender himself at any stage of the cause, subject to the observance of certain rules and restrictions.

We shall at present confine ourselves to those rules and restrictions which ought to be observed in the making of the surrender, at any time *after* the commencement of the original suit, and *before* judgment therein; reserving the consideration of the surrender *after* judgment to a future part of the work, when we shall treat of the proceedings

V. Sec. VI.] IN BAILABLE ACTIONS.

Of the Surrender in Discharge of Bail.

ceedings against bail, either by action upon their *recognizance*, or by *scire facias*.

The manner in which such surrender is to be made has been shewn above; it now remains only to make a few remarks upon,

(A) The Time when such Surrender may be made; and what is requisite to be done before the making thereof.

(B) The Power of the Bail to take their Principal to surrender him.

(C) The necessary Steps to be taken after the Surrender; and herein of the Exoneretur, &c.

(D) Certain Circumstances which discharge the Bail without any Render.

(A) Of the Time of making such Surrender, and and what is necessary to be done before the making thereof.

There is no part of the practice which seems to have undergone a greater alteration by modern rules and decisions than this.

Formerly no surrender could be made before the return of the writ; for if the defendant had been arrested and given bail, it used to be held that nothing could be a performance of the bail-bond but putting in bail above, nor could a surrender be made before that was done. *Harrison v. Davies*, Burr. 2683.

But now it is determined otherwise; a defendant who has given a bail-bond, may surrender himself to the sheriff before the return of the writ, the bail-bond may be given up, and it will be considered as if no such bond had been given; for if the sheriff has the defendant in his custody to answer the exigency of the writ, it is sufficient. *Jones v. Lauder*, 6 D. & E. 754. *Stamper v. Milbourne*, 7 D. & E. 122.

But *after* the return of the writ, it is necessary to put in bail before a surrender can be made.

And either party may put in bail above, that is to say, either the defendant himself to keep his liberty, the bail below in order to make a surrender, or the sheriff to prevent

Of the Surrender in Discharge of Bail.

vent his being ruled. So that if the bail below wish to secure themselves, and suspect that the bail above which the defendant is about to put in cannot justify, they may at the same time give notice of other bail, or that they themselves will be bail above. Thus two notices and two bail-pieces may appear at the same time; and if defendant's bail should not be accepted, the bail put in by the bail below may immediately render defendant, and thus all parties be discharged, except the defendant himself. *Berchere v. Colson*, Str. 876. *Golbeir v. Colson*, 1 Barn. 369.

When bail above is put in in order to warrant a surrender, it must be complete bail, two persons at least; if only one, and a surrender made thereon, it is bad, and plaintiff may proceed on bail-bond. Bar. 46. 172. Cro. Eliz. 672.

But if any *two* bail be put in, they may render, even though they are excepted to; for it is not necessary that they should justify first. If, however, they attempt to justify, and are *rejected*, then they cannot render, because rejected bail are as no bail, but new bail may immediately be put in and render, provided the time for putting in bail is not expired, or further time has been obtained.

If bail are put in and excepted to, and then others added, and one of the added bail afterwards rejected, provided the first excepted bail be not struck out of the bail-piece, they may make a surrender of the defendant.

Excepted bail
surrendered af-
ter others were
added and re-
jected.

Two bail had been put in, they were excepted to; notice of adding and justifying two fresh bail was given; one of them was afterwards rejected; two days further time was given to add another (though the rule to bring in the body had expired); instead of adding another, a surrender was made, and notice thereof given. An attachment issued, on the ground of the surrender being void. Upon motion to set aside the attachment it was contended, that there was no bail to warrant the surrender, and that therefore it was bad; the first bail having been abandoned by adding others, and one of the added bail having been rejected, there was no complete bail. *Per Lord Kenyon*—On the bail-piece there are the two excepted bail, and the one added bail; the excepted bail had not been rejected; they therefore were compe-
tent

Of the Surrender in Discharge of Bail.

tent to surrender; they were still liable on their recognizance. No exoneretur was entered as to them. Attachment set aside. *The King v. Sheriff of Essex*, 5 D. & E. East. 1794.

But although bail excepted to may render without justifying, yet such render must be before the time for such justification expires. For if bail are excepted to, and they give notice of justification, and do not appear on the day appointed, and obtain no further time to justify in, they are out of court, and cannot afterwards surrender the principal; but bail-bond may be assigned. *Hardwicke v. Black*, 7 D. & E. 297.

At what time
excepted bail
must render.

In this case, however, surrender having been completed before the actual assignment of bail-bond, court set aside proceedings thereon, on payment of costs.

Another alteration in the practice in this respect is, as to the justification in order to surrender, if the bail-bond has been assigned.

Formerly, when the bail-bond had been once assigned, it was necessary, in order to stay the proceedings thereon upon the ground of a render having been made, that not only bail should be put in, but that they should justify before such surrender was made; but now bail may be put in and render without any such justification, and then move to stay proceedings on bail-bond; and this in both courts. *Edwin v. Allen*, 34 G. 3. *Meysey v. Cornell*, 5 D. & E. 534. *Hall and Walker*, 1 H. Blac. 638.

Of rendering
after assignment
of bail-bond.

In like manner formerly, if the sheriff had been ruled to bring in the body, no render could be made to prevent an attachment, unless bail when put in had justified. But now by R. Trin. 33 G. 3. 5 D. & E. 368. it is ordered, That bail shall and may be at liberty to render the defendant, notwithstanding such rule upon the sheriff at any time before the expiration thereof; the attorney for defendant giving notice of such render to plaintiff's attorney without delay, and making affidavit thereof.

Of rendering
after sheriff
ruled to bring
in the body.

So that in such case no justification is now necessary; and this in both courts. *Hall and Walker*, 1 H. Blac. 638.

The above points seem now settled, though various contradictory cases before this period may be found in the books upon them.

If bail be surreptitiously put in, though they may justify, and afterwards render the defendant, yet such render shall

How if bail be
put in surrepti-
tiously.

Of the Surrender in Discharge of Bail.

shall be nugatory, because they shall be deemed as no bail, and therefore cannot surrender. *Jackson v. Morris*, 2 Blac. Rep. 1179.

(B) (B) Of the Power of the Bail to take their Principal to surrender him.

If defendant secretes himself, what bail may do.

When taken by them, how to proceed.

At what time and place they may take him.

If defendant secretes himself to avoid being rendered by his bail, they, or either of them, may take him wherever they meet with him, even in his own house, so that they break no locks. When taken, one of the bail must always remain with him, (for they cannot depute their right of custody to another, without defendant's consent in writing,) till he is rendered. If he consents to go to an officer's house till rendered, bail must take such consent from him in writing. But so soon as they have delivered him upon the render into the custody of the tipstaff, he is answerable for his escape.

Bail cannot take defendant on a *Sunday* in order to surrender. *Brooks v. Warren*, 2 Blac. 1273.

But 6 Mod. 231. *contra*. Bail may take principal on a *Sunday*, and confine him till next day, and then render him.

Bail may seize a bankrupt while under examination, or going to a court of justice.

So they may have a habeas corpus to bring up a king's debtor, or any one in custody of any sheriff or any gaoler, or a person convicted of felony, to render him in their discharge. Str. 1217. *Vergen's bail*.

Although such prisoner be sentenced for transportation. *Ibid*.

So if he be in custody on a charge of felony. It is, indeed, almost a matter of course, and what the bail are entitled to ask *ex debito iustitie*. Per Lord *Kenyon*, in *Sharp v. Sheriff*, 7 D. & E. 226. where the court granted an habeas corpus to the sheriff of ———, in whose custody defendant was, under a charge of murder, for the purpose of bringing him up and surrendering.

In such cases the habeas corpus should be on the crown side. But if the convict be actually on board a ship, and ready for sailing, court will not grant such habeas corpus. *Fowler v. Dunn*, Burr. 2034.

But although no habeas corpus will be granted on account of the inconvenience which might result from bringing

Of the Surrender in Discharge of Bail.

bringing him up, yet the court may be moved for a rule to shew cause why an *exoneretur* should not be entered on the bail-piece on the ground of impossibility to render the defendant, which rule will be granted. *Wood v. Mitchell*, 6 D. & E. 247. See this Sec. D.

So an impressed man in custody of the Savoy, may be taken and rendered; who shall first be delivered over to the marshal, with orders to be delivered *instante* to the keeper of the Savoy. *Bond v. Isaac*, Bur. 339.

(C) Of the necessary Steps to be taken after the Surrender; and herein of the Exoneretur, &c. (C)

No surrender is good until notice in writing given to plaintiff's attorney. R. Trin. 1 Ann.

Notice of the render must be given.
Fees must be paid.

Nor is it complete until the fees are paid; for even if the judge's signature of the entry of the commitment be on bail-piece, if fees are not paid, it will be ordered, on motion, to be struck out. *Huxley v. Clendon*, Com. 554. Bar. 70.

Such omission shall not vitiate a surrender, but if any costs be incurred by reason thereof, court will require the bail to pay them before they are discharged. *Wells v. Ormond*, 6 Mod. 238.

When the surrender has been made, the bail-piece shall be marked and discharged, otherwise the plaintiff may proceed against the bail. Comb. 263.

An *exoneretur* must be marked on bail-piece,

For without an *exoneretur* they are liable on their recognizance. See *ante*, A. *The King v. Sheriff of Essex*.

If bail-piece be filed without being discharged by master, bail remain liable, though defendant be in actual prison. Mod. Caf. 340.

or bail will be liable.

This discharge is made by the master entering an *exoneretur* thereon, after which it is filed by the proper officer.

How *exoneretur* entered.

A. sued B. in three actions, and he put in three bails; plaintiff recovered in all; defendant rendered himself, and one of the bails entered an *exoneretur* on the bail-piece, which the rest did not. And *per Cur.* the rendering is a discharge *in posse* to all, but not complete and actual as to all till *exoneretur* entered on all. *Williams v. Williams*, Sal. 98.

A bail excepted to, who does not justify, may at any time move to have his name struck out of the bail-piece; When it may be moved for.
for

Of the Surrender in Discharge of Bail.

for as he was excepted against, he might reasonably conclude that he was no longer to be considered as bail.

Jones v. Tub, 1 Wil. 337.

If omitted to be done at the proper time.

Upon rule to shew cause why an *exoneretur* should not be entered upon the bail-piece, it appeared that the bail had rendered the defendant regularly, and had given notice of the render to plaintiff's attorney; that defendant had been since in custody, and that defendant's attorney had omitted to enter an *exoneretur* upon bail-piece. Rule made absolute upon paying the costs which had accrued since the render. *Weaver v. Chandler*, Say. 7.

Where no *exoneretur* is entered on the bail-piece, and plaintiff proceeds to judgment against bail, if it appears that defendant has done every thing proper on his part, and that it was owing to plaintiff's attorney that the bail-piece was not properly discharged, by his taking the same away, judgment will be set aside, and *reddidit se* ordered to be entered on bail-piece, and the same to be filed. *Knight v. Winter*, Bar. 68.

Of the *reddidit se*.

The *reddidit se* on the bail-piece is only an escrol or warrant to the officer, (viz. the signer of the writs in K. B. and filazer in C. B.) to enter the surrender on record; Where the entry on bail-piece, therefore, was obtained by fraud, and no surrender on record, the court held the surrender ineffectual, and ordered the *reddidit se* to be struck out. Bar. 79.

How to get *exoneretur* if bail-piece lost.

The bail-piece was lost, on which the bail moved that a new bail-piece might be filed, in order that he might surrender the principal, (who had been actually in custody of the bail for some days,) which he could not do for want of a bail-piece; and though the plaintiff refused to consent, yet the court gave leave to put in bail *de novo*, on hearing the whole matter; which was done, and then the bail surrendered. Bar. 108.

Of the *committitur*, and the use thereof.

Although the bail be discharged by the entry of the *reddidit se* in the judge's books, and the *exoneretur* on the bail-piece, yet the marshal is not duly charged with the custody of the defendant until the entry of the *committitur* and surrender be made in the marshal's books. So that until that be done, he will not be liable to an action should defendant escape. *Watson v. Sutton*, Salk. 273. But bail would still remain liable, 6 Mod. 238.

Under

Of the Surrender in Discharge of Bail.

Under every commitment should be entered the state of the cause at the time of the render, agreeable to the rule of court. East. 8 Geo. 3.

(D) Of Circumstances which discharge the Bail without any Render.

(D)

There are certain circumstances which entitle the bail to a discharge, and which are proper grounds, supported by affidavit, for moving the court for leave to enter an *exoneretur*; or in vacation a judge will order it. As if defendant is a bankrupt and has obtained his certificate. Bar. 104. Cow. 824. 1 D. & E. 624. Or if pending the suit he is made a peer; *Trinder v. Shirley*, Do. 45.; or becomes a member of the House of Commons; *Langridge v. Flood*, H. 26 Geo. 3. Tid. 152.

If defendant is a bankrupt, or made a peer, or the like.

The reason is, that the bail only engaged for the principal in the then situation of the parties, but by the change of circumstances, it is now become impossible for them to render him.

Reason thereof.

On the same principle since the passing of the alien act 33 G. 3. c. 4. where government have sent defendants out of the kingdom as being foreigners under that act, bail have often applied for an *exoneretur* to be entered, which has been always granted; except they have effects in their hands belonging to the defendant, out of which they could repay themselves should the plaintiff recover; or where the attorney had indemnified the bail and he had got a draft from the defendant on a banker in town sufficient to secure him. In these cases of aliens, therefore, an affidavit is expected, that the bail are not so indemnified. *Merrick v. Vaucher*, 6 D. & E. 51. *Coles v. Dehayne*, ib. 52.

How in cases of aliens sent abroad.

In the last case, the cause was tried, and a verdict for plaintiff; after which the court was moved for leave to enter an *exoneretur*, on the bail paying 1000l., the amount of the draft left for their indemnity, and no other effects being in their hands out of which they could pay the costs; but the court held, that as the bail had chosen to defend the action with a view of taking the chance of a verdict in their favour, they ought to pay the plaintiff's costs out of their own pocket, 6 D. & E. 246.

Bail try such actions at their own risk.

So a physical impossibility to render, as dangerous illness or the like, have been held good grounds for an

Other grounds for *exoneretur*; illness, &c.

exoneretur;

Of the Surrender in Discharge of Bail.

exoneretur; and where a defendant was sent abroad by government in the king's service, and there unavoidably detained, so that he could not be rendered, it was held sufficient.

Declaration varying from process.

If plaintiff declare for a different cause of action than what is mentioned in process, or in a different county, provided the proceedings be by special original, bail will be discharged.

WE HAVE HITHERTO SUPPOSED THAT THE DEFENDANT, AGREEABLE TO THE CONDITION OF THE BAIL-BOND, APPEARS AT THE RETURN OF THE WRIT, BY PUTTING IN SPECIAL BAIL, CALLED BAIL TO THE ACTION, OR BAIL ABOVE, AND HAVE SHOWN HOW TO EXCEPT AGAINST, JUSTIFY, ADD TO, OPPOSE, AND PERFECT SUCH BAIL, AND ALSO HOW TO SURRENDER DEFENDANT IN DISCHARGE OF THE BAIL; BUT IN CASE THE DEFENDANT SHOULD FAIL IN THIS HIS APPEARANCE, AND NEGLECT TO PUT IN BAIL, OR TO JUSTIFY THEM IF EXCEPTED TO, IN DUE TIME; PLAINTIFF HAS TWO REMEDIES AT HIS ELECTION; THE ONE, BY GETTING THE BAIL-BOND ASSIGNED TO HIM, AND PROSECUTING THE SURETIES MENTIONED THEREIN; THE OTHER, BY PROCEEDING AGAINST THE SHERIFF, TO COMPEL HIM EITHER TO PUT IN GOOD BAIL, OR HIMSELF TO SATISFY PLAINTIFF'S DEMAND.

SECTION VII.

Of the Assignment of the Bail-bond, and the Proceedings thereon.

Remedy at common law if defendant did not appear.

At common law, the only regular mode of redress which a plaintiff had, when the defendant neglected to put in or to perfect bail above, was to proceed against the sheriff, and cause him to be amerced.

The sheriff might indeed have given up the bail-bond, and suffered plaintiff to prosecute the bail; but this was merely optional on his part; and even if he did so, the action could only have been brought in the name of the sheriff, who might at any time have released it, and harassed the plaintiff by compelling him to resort to a court of equity. To remedy this inconvenience, the statute of 4 & 5 Ann. c. 16. was passed for the express purpose of

Of the Assignment of the Bail-bond.

of amending the law, and by the 20th sect. thereof,
 " the sheriff is bound, at the request and cost of the
 " plaintiff, or his attorney, to assign him the bail-bond
 " by indorsing the same, and attesting it under his hand
 " and seal in the presence of two or more credible wit-
 " nesses, without stamp, provided it be stamped before
 " action is brought thereon; and if the security be for-
 " feited, the plaintiff, after assignment, may bring an
 " action thereupon in his own name, and the court may,
 " by rule, give such relief to the plaintiff and defendant in
 " the original action, and to the bail upon the security, as
 " is agreeable to justice and reason; and such rule of
 " court shall have the nature and effect of a defeazance
 " to such bail-bond."

How enlarged
by statute, or-
dering assign-
ment of bail-
bond.

The above statute, by which the assignment of the bail-
 bond, and the proceedings thereon, are authorised and
 regulated, presents three things to our consideration:
 namely, the assignment of the bond; the action thereon;
 and the equitable interference of the court in giving re-
 lief therein.

(A) Of the Manner, Time, &c. of assigning
 the Bail-bond.

(B) Of the Action thereon.

(C) Of staying and setting aside the Proceedings.

(A) The Time, Manner, &c. of assigning the
 Bail-bond.

(A)

If bail above be not duly put in, or if put in, and
 excepted to, they do not justify in the time limited by
 the rules of the court, and the plaintiff would obtain the
 bail-bond from the sheriff, his attorney should apply in
 the following manner:

How to procure
assignment.

*If in Middlesex, to the under-sheriff at his office in Took's court,
 Curfitor-street; or if in London, to the secondary of the comptroller
 where the bail-bond was taken; or if in the country, to the under-
 sheriff; either of whom is bound to indorse an assignment thereon, and
 deliver it to the plaintiff or his attorney, if applied to. In London
 or Middlesex pay 5s.; in the country 6s. 8d.*

The manner in which the assignment is to be made, is
 shewn by the statute:—" The sheriff, or other officer, at
 " the

Of the manner
of making as-
signment.

Of the Assignment of the Bail-bond,

“ the request and costs of the plaintiff in such action or
 “ suit, or his lawful attorney, shall assign to the plaintiff
 “ in such action, the bail-bond or other security taken
 “ from such bail, by *indorsing the same, and attesting it*
 “ *under his hand and seal, in the presence of two or more cre-*
 “ *dible witnesses,* which may be done *without* any stamp,
 “ provided the assignment so indorsed be duly stamped,
 “ before any action is brought.”

Statute compul-
 sory on sheriff.

The statute is compulsory upon the sheriff to assign the bail-bond at the request of the party; but if he refuses, no attachment will lie against him as it is not a contempt of the court, but he is liable to an action on the case; such an action was brought in *Stamper v. Milbourne*, 7 D. & E. 122.

Of the time of
 making assign-
 ment.

The statute does not mention any particular time in which it is to be assigned. It is necessary therefore to stay until the bail-bond be forfeited, before such assignment is made; although no action can be brought thereon till it be forfeited.

Of the effects of
 such assignment,
 and the caution
 necessary in tak-
 ing it.

It is advisable, however, for the plaintiff not to take an assignment of the bond, unless he is well convinced of the responsibility of the sureties mentioned therein. For it is at his election either to have the bond assigned, or to proceed against the sheriff; but when he has made such election, by taking an assignment, he discharges the sheriff, and cannot afterwards resort to him; for the court will not, in such case, grant him a rule upon the sheriff to return the writ. *Lord Brooke v. Stone*, 1 Wil. 223. Sal. 99.

Besides which (in B. R.) if the bail below should become bail above, he cannot, after taking such assignment, except to them. Sal. 97.

Plaintiff not
 compelled to
 take it.

The taking of the assignment of the bail-bond is a mere voluntary act of the plaintiff; for though the sheriff should tender it to him, he cannot be compelled to accept of it. *Rex v. Darwes*, Ld. Ray. 722.

Who must make
 it.

Either the high-sheriff, or the under-sheriff in the name of the sheriff, must assign the bail-bond, or it will be bad. Even an under-sheriff's clerk cannot assign it. *Kitsen v. Fagg*, Str. 60.

Where it may
 be made.

There is no necessity for the bail-bond to be assigned by the sheriff in his own county; it may be assigned any where. *Gregson v. Heather*, Str. 727. Ld. Ray. 1455. Fort. 366.

In

and the Proceedings thereon.

In the case of *Sparrow and Naylor*, in the court of Common Pleas, Blac. 876. it was determined, that where the plaintiff has not declared before the effoin day of the third term inclusive, after the return of his writ, he has deserted his cause, and is out of court, and cannot afterwards take an assignment of the bail-bond; because, by the sound construction of the statute 3 Ann. the suit must be depending when the bail-bond is assigned, and it was plaintiff's own fault in not declaring *de bene esse*.

When plaintiff loses benefit of assignment in C. B.

In writs of 10 not for assigned bail-bond in

But in B. R. the practice is otherwise; and although plaintiff does not declare within two terms after the return of the writ, (the time allowed by that court,) yet he may afterwards take an assignment of the bail-bond; and the reason is, because plaintiff is not *obliged* to declare *de bene esse*; and if he does not, and defendant neglects to put in bail, he cannot declare at all, since he cannot declare *in chief* until defendant has appeared by putting in bail. The defendant, therefore, being in fault, ought not to take advantage of his wrong. *Merryman v. Carpenter*, Str. 1262.

but not in B. R.

Where the defendant is guilty of a neglect in not putting in bail in time, whereby the bail-bond becomes forfeited, the plaintiff may except to bail put in, in order to stay proceedings on the bail-bond, and it will not be a waiver of the assignment. Cowp. 769.

What shall not be a waiver of assignment.

(B) Of the Action on the Bail-bond.

(B)

The next thing which the above-mentioned statute of Ann authorises is, the *action on the bail-bond*, to be brought by the plaintiff in his own name, as assignee of the sheriff, which remedy did not exist at common law.

This action is given by the stat. of Ann.

"If the bail-bond, or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment made, may bring an action and suit thereupon in his own name."

It is to be observed, however, that before the bringing of such action, the statute directs, that the assignment so indorsed, as before directed, shall be duly stamped.

How to proceed in such action.

This stamp is a double sixpenny stamp, which is put just over the top of the assignment; and the clerk at the stamp-office writes, in red ink, the day of the month and year when the same was stamped.

Of the Assignment of the Bail-bond,

The assignment being thus completed, sue out process in the usual way; serve the bail with copy thereof, and afterwards declare against them, and proceed as in common actions, not bailable.

In K. B.

Of the time of bringing action on bail-bond.

If the arrest were in London or Middlesex, the bail-bond cannot be put in suit till four days exclusive after the return of the writ.

If the arrest were in any other city or county, not till six days exclusive after the return of the writ. R. M. 8 Ann.

So that if writ was returnable on the sixth in London or Middlesex, no action can be brought on bail-bond till the eleventh; if a country cause, not till the fifteenth; for the fourth or eighth day must completely expire; if Sunday be the last, it is not reckoned, in either court. 2 Str. 914. Ib. 782.

In C. B.

No bail-bond taken in London or Middlesex by virtue of any process returnable on the first return of any term, shall be put in suit until after the fifth day in full term; and that no bail-bond taken in any other city or county by virtue of such process, shall be put in suit until after the ninth day of full term. And no bail-bond taken in London or Middlesex by virtue of any process returnable on the second or any other subsequent return, shall be put in suit until after the end of four days exclusive of the return day; and no bail-bond taken in any other city or county by virtue of such last-mentioned process, shall be put in suit until after the end of eight days exclusive as aforesaid, upon pain of having all such proceedings on bail-bonds set aside with costs. R. Trin. 30 G. 3.

In what court such action must be brought.

An action on a bail-bond must be brought in the court where the bail was given. Walton v. Bent, 3 Bur. 1923. 3 Wil. 348. 2 Blac. Rep. 838. Morris v. Rees.

So if the bail-bond be given in a court of a county palatine, in an action brought there, and an assignment thereof is made by the sheriff, the action on the bail-bond must be brought in that court. Chesterton v. Middlehurst, Bur. 642.

The action must be brought in the same court, even though the bail be an attorney of another court. For, per cur. by entering into a bail-bond the defendant has waived his privilege, whether sued jointly or severally. Bar. 117.

So that if the process on which the bail-bond was given, was issued out of the Common Pleas, the action on the bail-bond must be brought there, and not in the King's

and the Proceedings thereon.

King's Bench. Bur. 1923. and *vice versa*, Blac. Rep. 838.

If brought otherwise, proceedings will be stayed, though after plea pleaded. The reason of the above practice is founded on the construction of the 4 Ann. c. 16. Because the court wherein such action is brought, is empowered to give a general relief to the plaintiff and defendant in the original action, upon equitable terms, which no court can properly do, as they cannot judge of the merits, except that in which the original action is brought, and before which the action on the bail-bond is depending. Blac. 839. 3 Wil. 348.

The reason thereof.

But this rule only holds where the action is brought by the plaintiff as assignee of the sheriff, and which is grounded on the 4 Ann. c. 6. s. 20.; for it does not extend to actions brought by the sheriff himself on such bond, as such actions may be brought in a different court than that where the original action was. 1 H. Blac. 631.

Exception to the above rule.

But the venue in an action upon the bail-bond by plaintiff, as assignee of the sheriff, may be laid in any county, since the assignment may be made any where by the sheriff. *Gregson v. Heather*, Str. 727. *Ld. Ray.* 1455.

In what county the venue may be laid.

In an action on a bail-bond, the defendants are not to be held to special bail, for that might occasion bail *ad infinitum*; but you must proceed therein by service of process, as in other actions not bailable; for which see *ante*, chap. 3.

It is not a bailable action.

The manner in which the bail-bond was assigned, ought to be set out in the declaration, to shew that it was done pursuant to the statute; but, although not accurately stated, the omission will be aided by judgment by default. *Mifflin v. Morgan*, *Ld. Ray.* 1564.

Of the declaration in such action.

Bail-bond may be sued by the executors of the assignee. *Nott v. Stevens*, P. Reg. 68.

Executors of assignee may sue.

In an action on a bail bond the arrest is not traversable, therefore none need be shewn; otherwise it would be a way to avoid all bail-bonds civilly taken, without exposing the party by an arrest. *Watkins v. Parry*, Str. 444. *Haley v. Fitzgerald*, Str. 643.

Arrest not traversable.

But the issuing of the process is traversable; so that plaintiff may plead, that no such bill of Middlesex, &c. issued; because, if no such writ issued, the bail-bond is *ipso facto* void, and consequently the plaintiff has no ground of action. *Saxby v. Kirkus*, Say. 116.

But the issuing of the process is.

Of the Assignment of the Bail-bond,

How far sheriff's bail are liable by the bail-bond.

There is a distinction between the extent of the liability of bail *below* and bail *above*, in an action against the former upon the *bail-bond*, and against the latter on their *recognizance*. In the latter case the bail are only liable to the extent of the *sum sworn to and costs*. *Jackson v. Hoffell*, Doug. 330.

But in the former they are responsible for the *whole of the debt and costs*, if they do not exceed the *penalty of the bond*; and this in both courts. *Savage and West* cited in *Orton v. Vincent*, Cow. 71. *Mitchell v. Gibbons*, 1 H. Blac. 76. See also *ante*, Sec. 5. and post, Sec. 8. D.

(C)

(C) Of staying and setting aside Proceedings on the Bail-bond.

This part of the practice authorised by 4 & 5 Ann.

It has been before observed, that the statute 4 & 5 Ann. authorises three things; 1st, The assignment of the bail-bond; 2d, The action thereon; and 3d, The equitable interference of the court to give relief to the parties. Of the two first we have already treated; it only remains to make a few observations upon the last.

which gives the court an equitable jurisdiction.

This equitable jurisdiction is given by the statute in the following words: "And the court where the action is brought may, by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the said bond, or other security taken from such bail, as is agreeable to justice or reason; and that such rule or rules of the said court shall have the nature and effect of a defeazance to such bail-bond or other security for bail."

The nature of the relief afforded is to stay the proceedings, or to set them aside.

The nature of this relief depends upon the circumstances of the case. If the assignment of the bail-bond has been *regularly* made, the relief granted by the court is to *stay* the proceedings; but if the assignment of the bond has been *irregular*, the relief then is to *set aside* the proceedings.

We shall therefore briefly consider—

(C. 1) *In what Cases, and upon what Terms, Proceedings on the Bail-bond will be stayed.*

(C. 2) *In what Cases the Proceedings will be set aside.*

(C. 3) *In what Manner the Proceedings are to be stayed, or set aside.*

(C. 1) *In*

(C.1) Sec. VII.] IN BAILABLE ACTIONS.

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and the Proceedings thereon.

(C.1) In what Cases, and upon what Terms, the Proceedings will be stayed.

(C.1)

That the plaintiff may not be delayed or defeated in the prosecution of his suit, the additional remedy of proceeding on the bail-bond is given him by the statute 4 & 5 Ann. in case the defendant does not appear (that is to say, put in and perfect bail above) in due time; for if he does, the condition of the bail-bond to the sheriff is then fulfilled, and the bail below are *ipso facto* discharged.

The intent of the statute, and the principle upon which the courts proceed in staying proceedings.

The chief object therefore is, to enforce the defendant's appearance.

But although the defendant may have neglected to appear within the time allowed, and by reason thereof the plaintiff may have procured an assignment of the bail-bond and regularly brought his action thereon, yet if the defendant should be afterwards willing to put in and perfect bail in order to proceed in the original action, and to try the merits, and if the plaintiff be in no respect prejudiced thereby, it would surely be contrary both to reason and justice were the defendant to be excluded from so doing.

It was therefore, upon the principle of doing justice to all parties, that the statute authorised this equitable interference of the courts of which we are now treating.

To enumerate the particular cases in which this relief is granted, would be endless.

It may be taken as a general rule, that proceedings on the bail-bond (notwithstanding they may be regular) will be stayed in all cases where the plaintiff can be put in as good a condition as he would have been in provided the defendant had been guilty of no laches.

In what cases proceedings are stayed,

The inconveniences resulting to the plaintiff from the defendant's negligence in not perfecting bail are, the delay occasioned thereby in the original action, and the costs attending the assignment of the bail-bond and the proceedings thereon.

To remedy these inconveniences, certain terms are imposed upon the defendant, to which he must accede, as the conditions upon which the proceedings on the bail-bond are to be stayed.

and upon what terms.

Which terms usually are, that the defendant shall perfect bail in the original action, receive a declaration, plead *issuably*, take short notice of trial, and pay the costs to be taxed

Of the Assignment of the Bail-bond,

by the master incurred by the bail-bond being assigned and by the proceedings thereon.

Thus the plaintiff is reimbursed his expences, and gets to trial in the original action in as short a time as he otherwise would have done.

How, if plaintiff has lost a term, and been delayed going to trial.

But it sometimes happens that the defendant is guilty of a double neglect; first, in not putting in and perfecting bail in time, and thereby suffering the bail-bond to be proceeded upon; and then in not applying with all due diligence to get the proceedings on the bail-bond stayed. So that by reason of this delay, the plaintiff may have actually *lost a term*, or have been *hindered* from going to trial so early as he might have done, and therefore cannot now be put in a condition altogether so good as he would have been in, provided the defendant had been guilty of no laches.

Bail-bond then stands as a security.

Still, however, the court will exercise their equitable jurisdiction in granting relief to the defendant; but in order to do the plaintiff as ample justice as possible, and to make him a kind of compensation for the loss of time, and the consequent delay in the original suit, they add, in such cases, a further condition to the terms above-mentioned, namely, *that the bail-bond shall stand as a security for plaintiff's debt and costs if he recovers in the original action.*

In C. B. judgment is granted on bail-bond; but not so in B. R.

In the court of Common Pleas indeed the plaintiff has judgment on the bail-bond to stand as a security, and execution only is stayed thereon; Bar. 85. But the court of King's Bench does not go the length of giving the plaintiff judgment, but only of permitting the bail-bond itself to stand as the security, and for the proceedings thereon to be stayed. Imp. 170. This saves the expence of the judgment.

In either case, the advantage to the plaintiff is obvious, as he thereby gains a double security; and this is always given him when, by defendant's negligence, a term, or the opportunity of trial, is lost, and the plaintiff cannot be put in as good a condition as if he had not been delayed.

How far plaintiff must quicken defendant.

It used formerly to be held, that it was incumbent on the plaintiff to quicken the defendant, and to do every thing in his power to forward the proceedings, otherwise the bail-bond would not be allowed to stand as his security.

Thus

and the Proceedings thereon.

Thus it has been refused, because the plaintiff had not declared *de bene esse*, which he might have done, and had therefore himself not used his utmost diligence. *Ward v. Alderton*, P. R. 71.

But it has been since determined, that plaintiff is not bound to declare *de bene esse*, and therefore his not doing so shall not be imputed to him as a laches to deprive him of the benefit of the bail-bond as a security. *Merriman v. Carpenter*, Str. 1262. So held by court after consulting the Master. Mic. T. 1794.

If, however, the delay which he complains of, has been really owing to his own negligence, the court will not permit him to take advantage thereof; as if he does not put the bail-bond in suit so early as he might have done, and defendant, when it is put in suit, immediately applies to stay the proceedings, the court will stay them upon the usual terms, and payment of costs, without granting the bail-bond as a security, because the delay was occasioned by plaintiff's own default. *Hutchinson v. Hardcastle*, Bar. 103.

When the proceedings are thus stayed, and the bail-bond stands as a security, if the plaintiff succeeds in the original suit, and afterwards renews the action on the bail-bond, the bail cannot plead that their principal *compertuit ad diem*; but the court will give leave on motion to enter up judgment against them immediately. *Ostway v. Cokayne*, Bar. 85. Nor can the bail discharge themselves by a surrender.

But in C. B. the judgment (as before observed) is allowed in the first instance, so that plaintiff has afterwards nothing to do but sue out execution.

The inclination of the courts is to extend this equitable relief of staying the proceedings, to every possible case where justice seems to call for it; infomuch, that even after a *verdict* on the bail-bond, proceedings have been stayed.

In C. B. defendant being arrested in an action by an attorney for fees, entered into a bail-bond with sureties, which, for want of bail, was assigned, and actions brought thereon, wherein plaintiff declared; defendant pleaded *non est factum*, and after verdict defendant moved for leave to file bail in the original action on payment of costs, and consenting that plaintiff might have judgment on the bail-bond to stand as a security for what plaintiff

He is not bound to declare *de bene esse*.

But he ought to put bail-bond in suit with due diligence.

The effect of the bail-bond standing as a security in B. R.

In C. B.

Courts inclined to extend this relief. Even after verdict on the bail-bond, proceedings have been stayed.

Of the Assignment of the Bail-bond,

should recover; and produced an affidavit, that he never, in his own separate capacity, employed plaintiff as his attorney, and that he had a good defence; whereupon the rule was made absolute. *Birch, one, 18d. v. Graves, Bar. 74.*

The most usual cases are, where the defendant wishes to try the merits.

The above, therefore, are the most usual cases in which the proceedings on the bail-bond are stayed, namely, where the defendant in the original action wishes to be let in to try the merits; and such are the terms upon which he is permitted so to do.

Other grounds for staying proceedings.

If either party die, proceedings stayed.

But there are other grounds upon which the courts will stay the proceedings. Such as the death of either the plaintiff or defendant in the original action, provided such death happens previous to the time when judgment could have been obtained, had the defendant put in and perfected bail in time.

The general rule as to the terms upon which they are stayed in such case.

For the rule with respect to the death of the defendant is, that where the plaintiff might have had judgment against the original defendant, in case he had been guilty of no negligence, the bail below are liable for the whole debt and costs, to the extent of the penalty of the bail-bond, and not merely the sum sworn to. But where the plaintiff could not have had judgment in the original action, the proceedings may be stayed upon payment of costs only. *Orton and others v. Vincent, Cow. 71.*

And with respect to the death of the plaintiff, the rule is, that if the plaintiff in the original action dies before judgment could have been recovered therein, proceedings shall be stayed. *Willoughby v. Rhodes, Bar. 70.* If not till after judgment might have been obtained, his executor may proceed on the bail-bond, and the bail are liable for the debt and costs. *Nutkins, executor, v. Wilkin, Bar. 96.*

The reason thereof.

Which rules are founded upon the equitable principle already mentioned, and by which the courts are governed in staying the proceedings; namely, that the plaintiff shall be put in as good a condition as he would have been in had the defendant been guilty of no laches.

To what extent it is carried.

Upon the same principle, where the capias in the original action was returnable first return of Hilary, and defendant had obtained time by several orders to perfect bail till the last day of that term, taking notice of trial for the sittings after, but bail not being perfected, the bond

was

and the Proceedings thereon.

was assigned and put in suit, and defendant in the original action died 18th of April, whereupon the bail applied to stay proceedings upon payment of costs, the defendant having died before judgment could have been obtained against him; a rule nisi was granted. But upon shewing cause, the rule was discharged, the court saying plaintiff had been delayed; for if defendant had perfected bail in time, plaintiff might have tried his action at the sitting after Hilary; and by statute 17 Car. 2. might have entered his judgment therein after defendant's death. *Morley v. Carr*, Bar. 112.

But if the plaintiff, from his own default, neglects to take an assignment of the bail-bond, and proceed thereon, and thereby occasions a delay, and the defendant dies before judgment obtained on the bail-bond, the proceedings will be stayed thereon upon payment of costs only. *An exception thereto.*

The original action was in Michaelmas term, and for want of bail above, the bail-bond was assigned in February, after which defendant died, and bail moved to stay proceedings, plaintiff not having got judgment on the bond. On hearing counsel, the court ordered proceedings to be stayed on payment of costs, being of opinion that the matter was never carried further, than the bail-bond standing as a security for what should be recovered on the original trial; and if that had been the case, and defendant had died before the trial, the suit would have been at an end. The plaintiff might have proceeded more speedily; and if inconvenience happens to him, it is his own laches. *Heath v. Afley*, Bar. 61. *Davenport v. Wall*, ib. 62.

Again, if the defendant, in the original action, becomes a bankrupt, and obtains his certificate, and afterwards the bail-bond be put in suit against the bail, proceedings will be stayed. *Sanders v. Spinaks*, Bar. 105. *The bankruptcy of defendant, and his certificate,*

But if the defendant in the original action did not obtain his certificate until after the bringing of the action upon the bail-bond, (though such certificate was founded upon an act of bankruptcy prior to the bringing of such action upon the bail-bond,) the bail-bond is not thereby discharged, although the original debt is; because the action upon the bail-bond was for a new and distinct cause of action. *Cockerill v. Owsen*, Bur. 436. *sometimes a new ground for staying proceedings.*

Such

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Such certificate indeed would have discharged the proceedings depending against bail in an action upon the old debt, if they were *not already fined*. *Woolley v. Cobb*, Bur. 244.

Plaintiff may prove his debt under the commission, and yet proceed on bail-bond.

Where the defendant, in the original action, becomes a bankrupt, plaintiff may prove his debt under the commission, and afterwards, provided the defendant has not obtained his certificate, and does not put in bail above, may proceed upon the bail-bond; and this, although two terms have elapsed since the writ was returnable.

Although he has laid by and neglected to put bail-bond in suit for two terms.

The defendant was, on 18th July 1783, arrested on a bill of Middlesex, returnable on Thursday next after the Morrow of All Souls, and gave bond; he became a bankrupt before the return of the writ, and the plaintiff, 12th August, proved his debt: the defendant did not put in bail above, as he ought, four days after the return, nor did the plaintiff proceed by filing a declaration. The defendant not having obtained his certificate, plaintiff, 30th April 1784, took an assignment of the bond, sued out and served writ thereon, and declared 1st May. Defendant laid these facts before the court, and moved to set aside the proceedings. Upon shewing cause, it was alleged, that the case in 2 Str. 1262. was in point; and on the part of the defendant it was contended, that the plaintiff not having delivered a declaration *within two terms*, he was out of court, and therefore ought not to take the bond, and that his having proved his debt under the commission, he had waived all proceedings. But the court held, that nothing was a performance of the bond but putting in bail above, and discharged the rule. *Carmichael v. Chandler*, Imp. K. B. 174.

Another ground of staying proceedings,

Again, if through a mere mistake of the defendant, or his attorney, the bail-bond has been put in suit, the court will stay the proceedings, in order that such mistake may be rectified.

where bail bond is assigned through a mere mistake of defendant.

Defendant moved for ten days time to put in bail; and that upon putting in good bail, paying costs, pleading the general issue, and taking notice of trial within term, proceedings on the bail-bond might be stayed. On shewing cause, it appeared that plaintiff had sued out a *testatum* attachment of privilege from Middlesex into Yorkshire, and bail was taken as in a country cause, and filed with the filazer of Yorkshire, (instead of being filed with the prothonotary,) and in order to give defendant time to

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rectify the mistake, the rule was made absolute. *Garnett v. Heavyside*, Bar. 63.

In another case, the writ was returnable in Michaelmas term; bail was taken before a commissioner, notice thereof given, and the bail-piece was transmitted to defendant's agent; he incautiously filed it with the filazer, who as incautiously received it without being allowed by a judge; plaintiff laid by till Easter term, and then put the bond in suit. The court ordered the filazer to attend a judge for his *allocatur*, gave plaintiff leave to except against the bail, and stayed proceedings on the bail-bond; and it being urged, that plaintiff had lost a trial, the court said it was through his own laches. Bar. 103.

Another reason for staying the proceedings is that of a surrender having been made of the defendant, which see *ante*, Sec. 6. A.

The last ground which I shall mention for staying the proceedings is, upon payment of the debt and costs.

Proceedings on the bail-bond will be stayed upon the payment of the principal, interest, and costs, into court, *Butler v. Rolls*, 3 Salk. 56.; but not after notice of trial given; unless it be paid within such time as not to delay plaintiff from going to trial. Ib. 6 Mod. 25.

In debt on bail-bond, defendant moved to stay proceedings, having paid his principal's debt and his own costs, all but forty shillings, which he had tendered. But the court of C. B. on considering precedents, held, that the costs of the actions against the *principal*, and the *other bail*, must also be paid before proceedings could stay. *Walker v. Carter*, Blac. Rep. 816.

Of staying the proceedings,

upon payment of debt and costs.

What costs must be paid.

(C. 2) *In what Cases Proceedings on the Bail bond will be set aside.*

(C. 2)

It has been before observed, that if the assignment of the bail-bond, and the proceedings thereon, have been *regular*, the relief granted by the court is, to *stay* the proceedings, which is done upon certain terms agreeable to the circumstances of the case, and always upon payment of costs; because such proceedings could never have been *regular* unless the defendant had been in fault. But if such proceedings are *irregular*, the relief then granted is, to *set aside* the proceedings, and the plaintiff to pay the costs incurred by such irregularity.

The

Of the Assignment of the Bail-bond,

Upon what grounds proceedings set aside, for irregularity.

If bail-bond be assigned pending a rule of court.

If defendant died between the arrest and return-day,

or before assignment of the bail-bond.

If defendant has duly surrendered.

What surrender good.

The grounds of application, therefore, to set aside the proceedings, must be as various as the irregularities themselves; and these may be either in the writ, or the return, or in the arrest, or in excepting to the bail, or in the bail-bond itself, or in the assignment thereof; and which, in a great measure, may be collected from the different Sections in the former part of this work, under which the respective heads of practice are treated of.

If a rule be obtained to shew cause, &c. "and why all proceedings in the mean time should not be stayed," and pending such rule an assignment of the bail-bond is taken, it will be set aside, as having been made too soon, because the proceedings are totally suspended by this act of the court until such rule is discharged. *Swayne v. Crammond*, 4 D. & E. 176.

If an assignment be made of the bail-bond, and proceedings, even to judgment and execution against the bail, had thereon, where the principal died between the arrest and the return day of the writ, court will set same aside. *Hutchinson v. Smith*, 8 Mod. 240.

So if the bail-bond be assigned after the death of the original defendant, the court will stay proceedings against the bail. But if it appear, that plaintiff knew not of the death of the principal, they shall pay costs. *Kingston v. Holloway*, 1 Com. Dig. 492. 374.

So if defendant has surrendered in discharge of his bail before the bringing of the action on the bail-bond, it is a ground of application to set aside the proceedings.

Nor is it any objection, that the surrender was made after an exception against the bail, and without their justifying. *Phillimore v. Moore*, Bar. 117. Blac. 758. 1179. Sed Vide ante, Sec. 6. A.

(C. 3)

(C. 3) *In what Manner the Proceedings are to be stayed or set aside.*

Proceedings to be stayed or set aside by summons or motion.

Which should be done without delay.

In B. R. notice must be given to put in and perfect bail.

The manner in which proceedings are stayed, or set aside, is either by a summons before a judge, in vacation, or motion in court in term time.

The summons should be taken out, or the court be moved without delay, so soon as the action on the bail-bond is brought, and the bail are served with process.

It must be grounded on an affidavit that bail are put in and justified. In the first instance, therefore, give notice

and the Proceedings thereon.

tice that defendant will put in and perfect bail on such a day, (which should be two days exclusive of the day given,) and plaintiff, if he thinks fit, may except to such bail without any prejudice to his action on the bail-bond. *Boughton v. Chaffey*, 2 Wil. 6.

Having justified, draw up rule for allowance of bail; then take out summons, or get rule nisi on an affidavit of bail having justified, "to stay proceedings on payment of costs on bail bond, and in mean time all proceedings be stayed against them;" serve summons or rule nisi, and rule of allowance of bail; then move to make rule nisi absolute, and get costs taxed and paid, or plaintiff may proceed.

Let the summons or motion be, *in the original action.*

It was formerly the practice in B. R. that if, after regular bail had been put in, plaintiff excepted thereto, it was held a waiver of proceedings on the bail-bond; so that did he *not* except to them, he might be put off with bad bail in case the proceedings on bail-bond were set aside; and *did* he except to them, he himself waived the proceedings on bail-bond; which the court deeming a great hardship, made the following rule, that—Whenever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited, the *notice* (in case the party means to put in bail in order to stay proceedings in the bail-bond) should be, that he will put in and perfect bail such a day (analogous to the case where the sheriff is ruled, who, before he can discharge himself, must give notice that he will put in and perfect bail); and in that case, the plaintiff may oppose the bail in court without its being a waiver of the bail-bond. *Boldero v. Gray*, Cowp. 769. 18 G. 3, B. R.

When the judge's order is obtained, or the rule granted to stay proceedings, which is upon terms, and always that the defendant shall pay costs, to be taxed by the master, it is incumbent upon the defendant immediately to get an appointment thereon from the Master to tax the costs, and to serve a copy upon plaintiff's attorney; and when the costs are taxed, to pay the same without delay.

When the court is moved to *set aside* proceedings for irregularity, proper notice thereof should be given to plaintiff's attorney; a copy of which notice, together with an affidavit of the service thereof, must be produced in court to support the motion.

In B. R. plaintiff may now except to such bail without its being a waiver.

What steps must be taken by defendant, when order is obtained, or rule granted.

Notice of motion to set aside proceedings must be given.

Of proceeding against the Sheriff,

Defendant cannot afterwards plead in abatement.

After the proceedings on bail-bond are stayed, defendant cannot plead in abatement to the original action, but must plead in chief. Salk. 519.

SECTION VIII.

Of proceeding against the Sheriff, called ruling the Sheriff.

It has been before observed, that in case the defendant should not appear according to the condition of the bail-bond, and put in and perfect bail above in due time, the plaintiff has two remedies at his election; the one, by getting the bail-bond assigned, and prosecuting the sureties mentioned therein, which was considered in the last section; the other, (of which we are now about to treat,) by proceeding against the sheriff to compel him either to put in good bail, or himself to satisfy plaintiff's demand.

Plaintiff cannot rule the sheriff after assignment of bail-bond.

This mode of redress against the sheriff cannot be had if plaintiff has once taken an assignment of the bail-bond; for by that very act he makes his election of the remedy to which he means to resort, and thereby discharges the sheriff. Whenever, therefore, the defendant fails in putting in and perfecting bail in due time, and the plaintiff is not well satisfied with the responsibility of the sureties mentioned in the bail-bond, he must avoid taking an assignment thereof, and he will then be entitled to proceed against the sheriff.

Explanation of this proceeding against the sheriff.

The sheriff has the execution of all writs and process. When an action is commenced, the writ upon which the defendant is to be arrested is directed and delivered to the sheriff; he either makes the arrest himself, or issues his warrant to one of his bailiffs to make it. The party being arrested, enters into the bail-bond, (of which so much has been already said,) conditioned for his appearance at the return of the writ, which appearance is putting in and perfecting bail above. If, therefore, upon the return of the writ, or within the time allowed by the practice of the court for that purpose, the defendant does not so appear, the plaintiff has a right to call upon the sheriff, to know in what manner he has executed the writ delivered to him at the plaintiff's suit, and this is done

called ruling the Sheriff.

done by obtaining a rule of court for the sheriff to *return the writ*. The sheriff, having in fact, taken and arrested the defendant, can only make his return accordingly; for otherwise an action on the case might be brought against him for a false return; he therefore returns the writ, indorsed *cepi corpus*; after which another rule is obtained for him to *bring in the body*. Being unable to comply therewith, as the defendant is at large on the bail-bond, the sheriff is now compelled either to put in and perfect bail above to the action, which is the main object of this proceeding against him, and which he is permitted to do to exonerate himself, or he must himself answer the plaintiff's demand; for if he fails to bring in the body, plaintiff, at the expiration of the rule, may obtain an *attachment* against the sheriff, by which he is then *fixed* for the payment of the plaintiff's debt and costs.

The mode of proceeding against the sheriff is as follows:

In B. R.

Upon the return day of the writ, take out a rule from the clerk of the rules, to return the same; pay 4s. If in London or Middlesex it is a four-day rule; if elsewhere, six days. Serve copy of rule (if in London) on the deputy secondary, at the office in the Poultry, or Woodstreet, where your warrant was taken out. If in Middlesex, at the sheriff's office in Took's court, Curfitor-street. At the time of service shew the original rule, and put upon the copy the officer's name who arrested defendant; at the expiration of the rule, search with the custos brevium, at the Treasury-chamber, Westminster-hall, for return of writ. If it be returned cepi corpus, and bail be put in, in due time (but not otherwise), immediately except against them before the service of any other rule; then, at the same office, get another rule on the sheriff to bring

In C. B.

Upon the first day of term, or quarto die post of any other return, get a rule from the secondary, pay 4s. 6d.

How to rule the sheriff to return the writ.

Custos Brevium, Brick-court, Temple.

How to rule him to bring in the body.

Carry

Of proceeding against the Sheriff,

bring in the body, which is, as before, a four-day rule in London or Middlesex, and a six-day rule elsewhere. Serve copy thereof on sheriff, or his deputy, as before; and if the bail do not justify on or before the expiration of the rule, make an affidavit of the service of the rule, and let counsel move for an attachment against the sheriff for not bringing in the body pursuant to rule.

How to move for an attachment against the sheriff.

But if after the rule to return writ, upon searching at the Treasury-chamber, no writ be found, or if, after the rule to bring in the body, no bail be put in, either by sheriff or defendant, or if bail be put in, but do not justify, then move for an attachment (a) against the sheriff upon an affidavit, stating, in the first case, "the service of the rule annexed, the search with the *custos brevium*, the term the writ was returnable, and none to be found;" and in the second, "the service of the rule; and that no bail has been put in for the said defendant, the same having been searched for with the proper officer;" and in the third, "that the defendant did put in bail, but hath not justified the same, and the rule for bringing in the body is expired."

Get the rule, in the evening, at the clerk of the rules for the attachment, carry it to the crown-office, and one of the clerks there will make out your attachment; pay 13s. 4d.; carry attachment to the coroner, with your bill of costs, who makes out warrant thereon, and attaches sheriff. On return of attachment, call on coroner, who will pay you the money; if he refuse,

Carry this rule to the filazer, who will give you a rule for sheriff to bring in the body; take that to the secondary, who will give you a rule peremptory to bring in the body.

(a) By rule in B. R. Mich. 32 G. 3. it is ordered, that in future all writs shall be returned by the sheriff on the day in which the rule for returning the same shall expire, and in default thereof the plaintiff shall be at liberty to move for an attachment on the next day.

Get the rule, in the evening, at the secondary's for attachment, make out same yourself, on 2s. 6d. stamp parchment, carry it to the prothonotary's; signing 1s. 4d. sealing 7d.

called ruling the Sheriff.

refuse, get a rule at the crown-office for him to return the writ of attachment; if not returned, make affidavit thereof, and court will grant an attachment, and direct it to be executed by two elizors, being two persons named for that purpose by the master.

The secondary's.

Of Proceedings where Sheriff is out of Office.

When sheriff goes out of office, he must be called upon within six months afterwards to return the writ.

How if sheriff is out of office.

Formerly the proceeding could only be by distringas, as follows:

Get a rule for that purpose, (naming him as last sheriff,) serve it as above. If he return cepi corpus, sue out a distringas, (in order to compel him to bring in the body,) direct it to the present sheriffs, ordering them to detain the late sheriff for that purpose; it is to be left at the sheriff's office for four days exclusive. Sheriff will then return it on AOS. issues; sue out an alias, move to increase the issues; a side-bar rule will do. Having got the rule, serve sheriff with copy, and leave the alias writ of distringas. If not sufficient issues, then sue out a pluries, and so on till having issues to satisfy your demand; make affidavit of the several writs sued, and the returns thereon, and move the court according to 10 G. 3. c. 50. s. 3. for to order the issues levied from time to time to be sold, and the money arising thereby to be applied to plaintiff's costs, and surplus to be retained till defendant appear, or other purpose of the writ be answered.

In C. B. get a rule at the secondary's, as before, for sheriff to return the writ; if he return cepi corpus, get a note of same from custos brevium, take it to the filaxer for his rule to bring in the body, then take same to secondary's office, as before, who will give you a rule peremptory to bring in the body; serve copy thereof, and proceed by attachment, just as in other cases, and as above-mentioned, which is certainly more preferable than as in K. B. by distringas. Though now, by the late rule of that court, Trin. 31 G. 3. which see opposite, the mode of proceeding in B. R. may be equally expeditious as in C. B.

Of proceeding against the Sheriff, &c.

But now, by a late rule in *N. B.* The mode of proceeding by *B. R.* this proceeding by *dis-tringas* is rendered unnecessary, since a much quicker remedy, by rule of court is allowed; for by rule *Trin. T. 31 Geo. 3.* it is ordered, that from and after the last day of this term, where any sheriff, before his going out of office, shall arrest any defendant, and *cepi corpus* shall be returned, he shall and may within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted.

Having shewn the general practice, as to the mode of proceeding against the sheriff, we will now more particularly treat,

(A) Of ruling Sheriff to return the Writ, and how the Rule is to be served.

(B) Of ruling Sheriff to bring in the Body, and what he must do in consequence thereof.

(C) Of moving for an Attachment against Sheriff, and of the Nature and Operation thereof.

(D) In what Cases the Attachment will be set aside, or Proceedings stayed against the Sheriff.

(E) Of proceeding against the Coroner to return the Attachment.

(F) Of proceeding against Sheriff, when out of Office, to return the Writ, and bring in the Body.

(A) (A) Of ruling Sheriff to return the Writ, and how the Rule is to be served.

Plaintiff cannot rule the sheriff after an assignment,

If plaintiff accepts an assignment of bail-bond, he cannot have a rule for the sheriff to return the writ. *Ld. Brooke v. Stone*, 1 Wil. 223. Sal. 99. 3 Sal. 57.

But

Of ruling the Sheriff to return the Writ.

But that is, provided the bond is *valid*, as the assignment thereof then amounts to a return of the writ; but if it be a *void* bond, as having been executed after the return of the writ, or otherwise, plaintiff may then have a rule upon the sheriff, as if there had been no assignment. *Ld. Brooke v. Stone*, 1 Wil. 223.

If the bail-bond be valid; but otherwise if it be void.

A side-bar rule, for the sheriff to return the writ, having been obtained, pending an action where there was a demurrer to a plea vitiating the bail-bond, court refused to discharge the rule, notwithstanding the assignment of bond to plaintiff, but only enlarged it, till by the event of the suit it was proved whether the bond was good or not. *Ibid.*

But where a special bailiff has been nominated by plaintiff, or his agent, the sheriff is not bound to return the writ; and should the usual peremptory rule be made against the sheriff, in such case, to return the writ, the court, on motion, will discharge it. *Hamilton v. Dalziel*, Blac. 952. *De Moranda v. Dunkin*, 4 D. & E. 119.

Sheriff not bound to return the writ where a special bailiff is appointed.

In counties palatine, rule to return the writ must not be made on the chancellor of the palatinate or the like, but upon the sheriff. The chancellor only issues his mandate, the sheriff returns the writ.

A rule, calling on sheriff to return writ, must not be sued out in vacation; for if it be, though it is tested in term time, it is irregular, and an attachment grounded upon it will be set aside by the court, on motion. *The King v. the Sheriff of Cornwall*, 1 D. & E. 552.

When rule must be sued out.

All rules upon sheriffs should be served on the under-sheriff, though the rules should be *as against* the sheriff; for on motion for an attachment against the sheriff, for not returning a writ upon an affidavit of service of the rule on the under-sheriff, *per cur.* be it so, the attachment must be against the sheriff, and the service is proper on the under-sheriff, Bar. 30. And where an under-sheriff shut himself up, and could not be personally served with a rule to return a *capias*, a rule was ordered, that leaving a copy at his house should be good service. *Richardson v. Bailly*, Bar. 35.

How such rule to be served.

If a person, in fact, be not the under-sheriff, but yet acts as such, rule served on him will be good, and court will afterwards grant an attachment upon affidavit of such notice. *Cas. of Prac. C. B.* 123. *P. R.* 381. *Arne v. Neeler*.

Of ruling the Sheriff to return the Writ.

But if a rule be obtained against a sheriff, to return a writ, service on the under-sheriff's agent in town is not sufficient.

Rules, however, against the sheriffs of London, Middlesex, and Surry, seem an exception, and may be served on the agents; because the offices of the agents for the under-sheriffs of those counties are, in truth, considered as the offices of the under-sheriffs themselves; but if the rule were served on the agent any where but at the office, the service would be bad, even in the cases of London, Middlesex, and Surry. *The King v. Coles*, Do. 20.

But this case is somewhat doubted, for by stat. 23 H. 6. c. 10. sec. 1. sheriffs are directed to make yearly a deputy in the courts of Chancery, King's Bench, Common Pleas, and Exchequer of record, before they return any writ, to receive all writs and warrants; and a penalty is imposed upon omitting so to do. And by rule, 1654. sec. 1. every sheriff is directed to have his deputy in court to receive and return writs, and that each deputy yearly before Hilary term have his name and place of residence in London or Westminster, set and continued up in tables in the office of the prothonotary, so that there does not appear any reason to distinguish the offices of the under-sheriff's agents of London, Middlesex, and Surry, from those of other counties, and in truth the business of under-sheriffs, as to making out warrants and returning writs, is principally done by their agents in London. And in a case of the *King v. the Sheriff of Essex*, Mich. 34 G. 3. K. B. the court refused to set aside an attachment for not returning a writ in pursuance of a rule, upon the ground of its having been served upon the under-sheriff's agent; but the affidavit whereupon the attachment was obtained, not stating that at the time of the service the original rule was produced and shewn to the under-sheriff's deputy, they set the attachment aside upon payment of costs. Notes to Rules and Orders in K. B. 318.

Form of the rule.

The form of the rule, in both courts, should be, that the sheriff shall do the act required, upon notice to his under-sheriff.

Of the time allowed by the rule to return the writ.

N. B. In most of the cases here cited, the rules upon the sheriff appear to be *six*-day rules; the reason is, because by R. T. 5 & 6 G. 2. sheriffs were ordered generally to return writs, and bring in the body within *six* days after service of rule; but afterwards, in Trin. term, 6 G. 3. the

Of ruling the Sheriff to return the Writ.

the court made a rule, "that the sheriffs of London and Middlesex return their writs, and bring in the body within four days." The country sheriff's still have six, that rule not affecting them. Bur. 1921.

And by a late rule in B. R. Mich. 32 G. 3. all writs must be returned by the sheriff on the day on which the rule for returning the same shall expire, and in default thereof, the plaintiff shall be at liberty to move for an attachment on the next day.

Must be returned punctually on the last day.

This rule arose out of a case of *the King v. the Sheriff of Surry*, where the sheriff had not returned the writ till the morning of the 7th day, although before the sitting of the court; to remedy which practice the above rule was made. 4 D. & E. 496.

It has been before observed, that in B. R. when the bail below become bail above, you cannot except to them, so as to make them justify in the ordinary way; but if you do not approve of such bail, you may, in effect, compel their justification, as follows: First, enter an exception, as in other cases; then serve the sheriff with a rule to return the writ, if not already returned; and after return made, with a rule to bring in the body, which will oblige the bail to justify, or defendant to put in such bail as will.

How to proceed if bail below become bail above in B. R.

(B) *Of ruling the Sheriff to bring in the Body, and what he must do in consequence thereof.*

(B)

Upon the rule to return the writ being properly served, the sheriff either neglects to make any return, or he must obey the rule by returning *cepi corpus*; if he does the former, plaintiff may have an attachment against the sheriff for not returning the writ pursuant to rule; for he cannot have a rule to bring in the body, till it appears by the return of the writ that he has taken the defendant; but if he returns *cepi corpus*, then he may sue out another rule for him to bring in the body.

What sheriff must do when served with rule to return the writ.

A sheriff ought not to be ruled to bring in the body until the day after the expiration of the rule to return the writ. *Hutchins v. Hird*, 5 D. & E. 479.

Nor should he be ruled to bring in the body till the time for putting in bail has expired. *Rolfe v. Steele*, 2 H. Blac. 276.

When bail above is put in, in due time, and proper notice thereof given, an exception to such bail ought to be

What must be done before sheriff is ruled to bring in the body.

Of ruling the Sheriff to bring in the Body.

made, and notice of exception given to defendant's attorney before service of the rule to bring in the body.

There must be
an exception to
the bail, if any
put in,

If notice of exception be not given, a rule on the sheriff to bring in the body cannot be supported, and this, although the defendant had, on his part, waived the irregularity by giving a notice of justification; for it is no waiver by the sheriff. *Rogers v. Mapleback*, 1 H. Blac. 107. & vid. infra, *Cohn v. Davis*.

and that must
be regularly
made.

And this exception must be regularly made.

Defendant put in bail before a judge; plaintiff gave notice of exception, but did not enter the exception on the bail-piece, and for want of a justification in court, served the sheriff with a peremptory rule to bring in the body in six days; for want whereof, plaintiff moved for an attachment against him. The court held, that an exception in writing on the bail-piece, and notice thereof to the defendant's attorney, are both necessary; and that for want of the former, the bail (who had stood more than 20 days without exception entered) was become absolute, and ordered proceedings against the sheriff to be stayed. Bar. 102.

An exception to bail was regularly entered in the filazer's book, of which the defendant's attorney had verbal notice, but afterwards proceeded by giving notice of justification, and attempting to justify bail, who were rejected. The rule for bringing in the body having expired, and no bail being justified, an attachment was granted against the sheriff. A rule was obtained to shew cause why this attachment should not be set aside, on the ground, that a written notice of exception was not given to defendant's attorney; and on cause shewn, *per cur.* where there are two parties, and one of them takes a step, previous to which the other ought to have taken a step, the former waives the obligation which the latter was under, as between themselves; but not as relating to a third person. Here the waiver by the defendant, if it were one, was not a waiver by the sheriff. The rule ought to be strictly followed to prevent confusion. *Cohn v. Davis*, 1 T. R. C. B. 80.

The intent of
the rule to bring
in the body.

The sheriff having been ruled to return the writ, and having returned the same with a *cepi corpus*, plaintiff, as before-mentioned, sues out a rule for him to bring in the body; the intent of which rule being to compel the sheriff

Of ruling the Sheriff to bring in the Body.

to put in good bail above, the sheriff must put in the same accordingly.

If the sheriff returns a *cepi corpus*, or *languidus*, where the defendant is at large without any bail taken, an action for a false return lies against him. *Noy*, 39.

Upon the rule to bring in the body, it is no excuse that the sheriff had taken a bail-bond, and had permitted defendant to go at large. For it is at the peril of the sheriff he takes bail, on the stat. H. 6. and the party is not concluded thereby; the sheriff must therefore either bring in the body, or justify good bail in court. *Wolfe v. Col-lingwood*, 1 Wil. 262.

An in order to render the bail, when put in agreeable to this last rule, good and effectual, he must perfect the same by justifying.

There was formerly a practice of justifying bail *de bene esse* before a judge; and it used to be held, that where sheriff was ruled to bring in the body in a certain time, justification before a judge within that time was sufficient, unless plaintiff excepted thereto, and then it ought to be in court. *Price v. Street*, Bar. 102.

But this practice of justifying *de bene esse* before a judge, is now disused; and in the case of *Poole v. Peate*, in C. B. it is settled to be the practice, that sheriff must not only put in bail when ruled to bring in the body, but must also perfect bail by justifying in court; and this, although no exception to such bail has been made by plaintiff. 2 Blac. Rep. 1206.

The justification must be made within the time allowed by the rule for bringing in the body, otherwise an attachment may be moved for. But although the rule for bringing in the body has expired, yet if the defendant justifies his bail before the plaintiff moves for an attachment, the sheriff is not liable to the attachment. *Thorold v. Fisher*, 1 C. B. T. R. 9.

Rule for sheriff to bring in the body in six days, which the sheriff did not, plaintiff moved for an attachment, and had a rule to shew cause; the sheriff shewed for cause, that bail was put in and justified; but it appearing, that they had not justified before plaintiff applied for the attachment, the court ordered, that on payment of costs, the rule should be discharged. *Henley v. Anderson*, Bar. 80.

What sheriff must do thereon.

Must put in and perfect bail.

Formerly they justified *de bene esse* before a judge.

But now that practice is disused.

Within what time sheriff must justify.

Of ruling the Sheriff to bring in the Body.

Defendant was arrested last term, but no bail-bond taken. The sheriff being called upon, returned a cepi; and being served with a peremptory rule to bring in the body, bail was perfected in court, and the rule to bring in the body discharged; but the sheriff was ordered to pay the costs of the application, as the time for bringing in the body was expired, and the plaintiff entitled to move for an attachment. *Peefson v. Tracey*, Bar. 98.

Sheriff may put in and perfect bail without defendant's consent; and this, although defendant has escaped; but not if he be in actual custody.

The sheriff, when ruled to bring in the body, may put in bail for defendant without his consent, and justify the same in order to prevent an attachment.

In the case of *Macleed v. Marsden*, Bar. 32. the question was, whether a rule to bring in the body, after cepi returned, ought to be discharged or not? it being suggested, on behalf of the sheriff, that defendant was in custody, and had remained in gaol ever since the arrest; but the fact appeared otherwise, and defendant had been suffered to escape. *Per cur.* had the sheriff shewn defendant to have been in actual custody, the rule ought to be discharged; but as there is an escape, the rule should be obeyed, otherwise an attachment must be granted. But, by consent, the debt and costs were to be paid in a month, with five pounds for the costs of the motions.

How, if sheriff go out of office between the service and expiration of rule.

A sheriff who is ruled on the last day of a term to bring in the body, but goes out of office before the next term, is liable to an attachment for not bringing in the body. *Meekins v. Smith*, 1 C. B. T. R. 629.

(C)

(C) Of moving for an Attachment against the Sheriff, and of the Nature and Operation thereof.

When to move for attachment.

If the sheriff disobey the rules served upon him, that is to say, if, upon the rule to return the writ, he makes no return thereof, or if, upon the rule to bring in the body, the intent of which is, to compel the sheriff to put in and perfect bail, he neglects so to do, plaintiff may move the court for an attachment against him.

It is a criminal process.

The attachment is a criminal process; it must be made returnable on a general return, though the original process was on a day certain. Str. 624.

How proceedings thereon entitled.

A motion for an attachment, therefore, in the course of a civil suit, ought to go on the crown side of the court, and the affidavits entitled, "The King against the person

" to

Of the Attachment against the Sheriff.

to be attached," because it is not a motion in the cause, but arising out of it. *The King v. the Sheriff of Middlesex*, 3 D. & E. 133.

But until an attachment is moved for, the proceedings are on the civil side of the court, and must be entitled by the names of the parties.

An attachment now lies in both courts against the *present* or *late* sheriff, either for not returning the writ, or for *not bringing in the body*; although, until the late rule of King's Bench, Trin. 3: Geo. 3. it would only lie in that court against the *present* sheriff in the *latter* case; the mode of proceeding against the late sheriff being by distringas.

Against whom it will lie.

The rule to return the writ, or to bring in the body, is a six-day rule, except for the sheriffs of London and Middlesex, who have only *four* days allowed them after the service thereof; if not done in that time they are liable to an attachment, without further rule.

When granted.

But it is to be observed, that this is upon the supposition, that these rules, calling upon the sheriff, do not expire before the time has elapsed in which the defendant might have put in or perfected bail. For, in all these cases, the same time shall be given to the sheriff to do the act in, as would have been allowed to the defendant. For if it were otherwise, and by any contrivance of getting an immediate return of the writ, the rule to bring in the body should expire before the time had elapsed for defendant to put in bail; the consequence would be, that after the sheriff was fixed, the defendant to an action on the bail-bond, might plead *comperuit ad diem*, and so deprive the sheriff of his remedy. *Spicer v. Linnell*, East. 23 G. 3. Imp. K. B. 159.

If the attachment goes against the present sheriff, it should be directed to the coroner; but if against the late sheriff, it should be directed to his successor.

How to be directed.

A motion for an attachment should be grounded upon an affidavit, stating, that the defendant was served *personally* with a copy of the rule, and that the original was shewn to him at the same time. *The King v. Smithies*, 3 D. & E. 351.

Of the affidavit necessary to support the rule.

But if the affidavit should not be full enough, and the fact was so, the court will allow the prosecutor to make an additional affidavit as to that fact. *Ibid.*

An

Of the Attachment against the Sheriff.

It may be moved for the last day of term.

But no attachment unless the bail put in is excepted to.

Except such bail be put in after rule served.

The operation of the attachment.

How far sheriff liable.

(D)

In what cases defendant may be let in to justify bail, and try the cause, after sheriff is fixed.

An attachment against a sheriff may be moved for the last day of term. Bur. 651. And it is absolute in the first instance. R. Trin. 17 G. 3.

If bail have been put in who did not justify in time, plaintiff cannot move for an attachment against sheriff, unless he had regularly *excepted* to the bail. Loft. 159.

But this must be understood to mean, where bail is put in before any rule served to bring in the body; for if bail be put in after rule served, bail must justify, though no exception, and it would be absurd to except; but if plaintiff should do so, he lets in defendant to justify his bail at any time within four days after exception.

The operation of the attachment is, the fixing of the sheriff with payment of the debt and costs. He must seek his remedy over, either upon the bail-bond given to him; or against the officer who arrested the defendant, or his sureties; or in London, against the secondary of the Compter, or officer who took the bail-bond, if any, or his sureties.

In the Common Pleas, the sheriff is liable, upon an attachment, to pay the plaintiff the *whole debt* due, and costs, *beyond the sum sworn to*, and indorsed on the writ, to the amount of the penalty in the bail-bond, in the same manner as the bail would have been, had good bail been put in. *Fowlds v. Mackintosh*, 1 H. Blac. 233.

So in K. B. for it is his own neglect in not bringing in the body or putting in good bail. Trin. 1797.

(D) In what Cases the Attachment will be set aside, or Proceedings stayed against the Sheriff.

It used to be the received notion, that when the sheriff was once fixed, by an attachment having regularly gone against him, bail could not justify, nor could the attachment be set aside; but that the utmost that could be done was, for the court, upon application, to let in the defendant to a trial upon terms, provided he had merits, and in the mean time to *stay* the proceedings against the sheriff upon the attachment. Tid. 166. Loft. 438. *Overton's* case, in 26 G. 3.

But the practice is now otherwise; for the courts are governed by the same principle, in letting the defendant in

Of the Attachment against the Sheriff.

in to try the merits of the original action after an attachment is issued, as they are in letting him in after the bail-bond has been assigned.

The rule therefore is, that whenever bail have justified, (although after the attachment against the sheriff has issued,) if the plaintiff has not been delayed from going to trial, the attachment will be set aside upon payment of costs only; but if plaintiff has lost a term, that is to say, a trial, then the attachment will remain in the office, and stand as a security to plaintiff, in case he should obtain a verdict.

The rule to bring in the body expired on the 6th; an attachment against the sheriff, for not bringing in the body, was moved for upon the usual affidavit, and obtained on the 7th; upon the 8th defendant justified his bail in the cause, and on the same day moved, that the attachment should be set aside, upon payment of costs, bail having justified, and no trial having been lost, which was granted accordingly; and the court said, that the distinction contended for, between the case of setting aside an attachment when no trial had been lost, and staying proceedings on a bail-bond, under the same circumstances, had no foundation. *White v. Dunbar*, 32 G. 3. S. P. *Hill v. Bolt*, 4 D. & E. 352.

The same practice is now established in the Common Pleas. *Callan v. Tye*, 2 H. Blac. 235.

But upon a similar application, where it appeared that a trial had been lost, the court ordered the attachment to remain in the office as a security for the plaintiff's debt, and the defendant to consent to go to trial at the sittings after term. *Gravett v. Williams*, 4 D. & E. 352. n.

The defendant is also let in upon the same terms, *mutatis mutandis*, as in the case of staying or setting aside proceedings upon the bail-bond; indeed the proceedings are so analogous, that it may be useful for the reader to refer for further information on this subject to the 7th section of this chapter.

It is to be observed, that whenever the application to set aside the attachment is made on the part of the defendant, the court will expect an affidavit of merits, but not so if made by the sheriff. *The King v. the Sheriff of Surry*, 7 D. & E. 239.

But then to prevent collusion, although the sheriff cannot swear to merits, whenever such application to set

Affidavit of merits, if the party applies.

What affidavit if sheriff applies.

aside

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aside the attachment comes from the sheriff, there must be an affidavit that the application originates from him, and is not made in collusion with the defendant in the cause. *Ibid.*

Attachment not set aside if sheriff guilty of laches.

As not taking bail bond, but undertaking of defendant only.

Such undertaking illegal, without plaintiff's consent.

Again where the sheriff has been guilty of any fault or laches, court will not set aside attachment.

As where it appeared that the sheriff had discharged the defendant out of his custody on his own undertaking to appear and put in bail, and had neglected to take such bail-bond as is required by the statute. *The King v. Sheriff of Surry*, 7 D. & E. 239.

For this is such a breach of duty that the sheriff is liable to an action for an escape, if bail is not put in, in due time, nor will the court relieve him from such action by permitting him to put in and justify bail afterwards. *Fuller v. Prest*, 7 D. & E. 109.

Such undertaking may be taken with the plaintiff or his attorney's consent, but not otherwise, as he cannot be compelled to accept it, since that would be in contravention of the statute 23 Hen. 6. and an encouragement to extortion. *Ibid.* See *ante* this Chapter, Sec. 4.

So Sheriff guilty of other neglects.

A rule was made in C. B. for an attachment against the sheriff for not returning a *capias*; whereupon the sheriff caused bail to be put in, and justified in court, and moved to discharge the rule for an attachment on payment of cost. Rule to shew cause, which was afterwards discharged; it appearing that the parties had been before a judge, who had made an order, by consent, that proceedings should be stayed on payment of debt and costs, to be taxed; and that plaintiff had been delayed two terms; and the counsel for the sheriff refusing to consent to go before the prothonotary, on the foot of the judge's order, the court were of opinion, that the rule for the attachment ought to stand. *Miller v. Vicaridge*, Bar. 28.

But if the sheriff, or returning officer, has done all in his power, and acted uprightly, he shall not be criminally punished by an attachment, although the rule of court may not be obeyed.

But not if he has done all in his power, and acted uprightly.

An attachment issued against the high-bailiff of Westminster for not bringing W.'s body into court pursuant to a peremptory rule, and having been examined upon interrogatories, it was referred to the prothonotary, as usual, to examine whether he had cleared himself of the contempt

Of the Attachment against the Sheriff.

contempt or not? the prothonotary reported specially, and the fact appeared, "that W. being confined in the Gatehouse for a criminal matter, was, by leave of the judge, charged with a bailable action by a *capias ad resp.* directed to the sheriff of Middlesex, who made a mandate to the high-bailiff, who charged W. therewith in custody; which W. afterwards escaped from the Gatehouse, which is the prison for the Liberty of Westminster, and to which the high-bailiff is obliged to carry his prisoners within twenty-four hours after arrest. That the high-bailiff and keeper of the Gatehouse are appointed by, and hold their places under the dean and chapter of Westminster, and both give security to them; but the keeper gives no security to the high-bailiff."—On this report the court were of opinion, that the high-bailiff had cleared himself of the contempt, and ordered the attachment to be discharged, the high-bailiff having done every thing in his power to secure the prisoner, and ought not to be criminally punished, *respondet superior* extends to civil cases only;—the prosecutor may bring his action for the escape. *The King v. Lever*, high-bailiff of Westminster, Bar. 34.

Again, no attachment shall issue against the sheriff, if the plaintiff is in fault, and has been guilty of any irregularity in his proceedings.

No attachment if plaintiff has become irregular.

Proceedings will be stayed against sheriff, where plaintiff has been guilty of any irregularity, as in not giving a proper notice of exception to bail. Bar. 102. *ante* B.

It is said, that if the persons taken by the sheriff in bail-bond be good men, and pending the suit become insolvent, he shall be excused; for the statute obliges him to take bail, and they were good at the time he took them.

How far sheriff liable if bail, though good when taken, is afterwards insufficient.

1 Lil. Abr. 511. Highmore on Bail, 49.

But, on motion to discharge proceedings against the sheriff upon the following circumstances, viz. that the bail to the sheriff was good when defendant was arrested, 4th August, and the sheriff was obliged to take bail under the statute of Henry the 6th, but the bail since were become insufficient, it was denied; the court, however, enlarged the six-day rule to bring in the body three days further. *Champion v. Townshend*, Bar. 80.

If the defendant die after the sheriff has been guilty of contempt, in not obeying any rule, though before the attachment

Defendant's death does not stay attachment, if sheriff be in contempt.

Of the Attachment against the Sheriff.

attachment actually issues, yet the attachment will not be stayed.

An attachment having been obtained against the sheriff of Middlesex for not bringing in the body, in a cause of *Robins v. Hall*, a rule was afterwards obtained to set it aside, because the defendant in the cause died before the attachment issued, though not till after the contempt was incurred; cause was shewn this day, and the court were of opinion, that as the sheriff was in contempt before the defendant's death, the attachment was regularly issued; and though the original cause abated by his death, yet that was no reason for setting aside the attachment against the sheriff, since he was in contempt before. 3 D. & E. 133.

(E)

(E) Of proceeding against the Coroner to return the Attachment.

It has been observed before, that the attachment sued out against the sheriff is carried to the coroner, who ought duly to return same, and pay plaintiff his debt and costs; but if the coroner does not return an attachment of contempt against the sheriff, the way to compel a return is, to move for an attachment against the coroner, directed to elizors.

The coroner of Middlesex not having returned an attachment of contempt against the sheriff, the court granted a peremptory rule (in the first instance) for an attachment against the coroner, directed to elizors, pursuant to the precedent of *Andrews v. Sharp*, Black. 911. The *King v. Peckham and Clarke*, 2 Blac. 1218.

For the more particular mode of proceeding against the coroner, see that part of the beginning of this Section, which is in *italics*.

(F)

(F) Of proceeding against the Sheriff, when out of Office, to return the Writ, or bring in the Body.

Sheriff must be called upon within six months after he is out of office.

By the 20 Geo. 2. c. 37. s. 2. it is enacted, *that no sheriff shall be liable to be called upon to make a return of any writ or process, unless he be required so to do within six months after the expiration of his said office.*

Unless

Of proceeding against the late Sheriff.

Unless he be required so to do] This must be by rule of court; for his having been requested by the party to return the writ, although the request were made within the six months, is not sufficient nor obligatory upon him. *The King v. Jones*, 2 D. & E. 1.

Within six months] In this case, as in all others, where it is not otherwise expressed, six lunar months is meant, or six times 28 days.

After the expiration of his said office] The day on which the old sheriff quits his office is to be reckoned one.— So that where the defendant went out of office on the 12th February, at four o'clock in the afternoon, (there being that year 28 days only in February,) and was not served with the rule to return the writ till the 30th of July following, it was held a day too late. *The King v. Adderley*, Do. 463.

If a sheriff, out of office, be called upon in due time, to return the writ, and neglects so to do, the constant mode of proceeding against him, in both courts, is by attachment; because the not returning it was a contempt of the court, and as, in strictness, he ought to have returned it before he went out of office, this contempt was actually committed whilst he was a servant of the court. *The King v. Adderley*, Do. 464.

In all cases, therefore, whether against the present or the late sheriff, the mode of proceeding for not returning the writ is, and always was, by attachment. So in the Court of Common Pleas, the same practice always prevailed, in order to compel a sheriff out of office to bring in the body. But it was not so, until lately, in the Court

of King's Bench; for, before the rule of court, Trin. 31 Geo. 3. if a sheriff had either returned the writ, with a cepi corpus, before he went out of office, or, upon being ruled to return the writ in the usual way after he went out of office, obeyed such rule by returning cepi corpus; in either case, plaintiff could not compel him to bring in the body, by proceeding immediately against the late sheriff, by rule and attachment, but was obliged to resort to the process of distringas against his successor, the present sheriff, which was dilatory and inconvenient. But now, by the rule above-mentioned, it is ordered, that "where any sheriff, before his going out of office, shall arrest any defendant, and cepi corpus shall be returned, he shall

Construction of the above act.

Attachment the constant mode of proceeding against the sheriff to return the writ.

And this whether against the present or late sheriff.

And now the same mode is used to compel him to bring in the body in both courts, though formerly not so in B. R.

Of proceeding against the late Sheriff.

"shall and may, within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted."

This mode of proceeding by attachment being much preferable to the process of distringas, the latter will, of course, fall into disuse.

The rules, &c. must be served on the late sheriff.

But care must be taken to serve the rules upon, and to obtain the attachment against the *late* and not the *present* sheriff.

On the 7th of November 1783, the late sheriffs of London were ruled to return the writ of *capias ad respondendum*; the late sheriffs returned, the defendant taken, whose body they had ready. On the 13th of November a rule was served on the present sheriffs to bring in the body, which they did not, and an attachment was granted. Now, upon motion to set aside the attachment, it appeared, that the old sheriffs returned the writ *cepi corpus*; and also, there was returned upon the writ, thus, by the new sheriffs: "This writ, as above indorsed, was delivered to us, the under-named now sheriffs, by the above-named late sheriffs at the time of their going out of office." That therefore the rule ought to have been upon the old sheriffs to bring in the body; upon shewing cause it was contended, that the new sheriffs having made the indorsement upon the writ, as before stated, they had made themselves answerable for the body; but the court held, "That the indorsement merely shewed how the writ came into the hands of the present sheriffs, and therefore set aside the attachment." Mich. Term 24 G. 3. *Leigh* gent. one, &c. v. *Turner*, Imp. C. B. 184.

Observations on the distringas.

As the process of distringas, notwithstanding the above rule, may, perhaps, be sometimes resorted to, a few observation thereon cannot be deemed wholly useless.

How long it must lie in the office.

The writ of distringas must always lie four days in the sheriff's office; the teste and return, therefore, should agree therewith; so that the return should never be made till four days after the expiration of the rule to *return the writ*. Suppose, therefore, such rule was obtained the first day of Michaelmas term, November 6, it expires (being a four-day rule) on the 10th; on that day sheriff returns *cepi corpus*; you then sue out the distringas, which

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which may be tested on the 6th of November, and be returnable on the 14th, (eight days after,) viz. four days after the expiration of the rule; it should be put immediately into sheriff's office, and lay there the four days; otherwise time will be lost, as it must always lie there four days; though not necessarily four days before the return, since it may be put in on the return-day, and lay four days from that time.

The nature of the distringas, and how it is rendered effectual by the application of the issues levied, is sufficiently explained by the following case:

This was the case of a sheriff who did not bring in the body after a return of a "cepi corpus" made by his predecessor; for which neglect, or refusal, several writs of distringas had issued against this *succeeding* sheriff. For the practice is, that if a sheriff, in office, returns a cepi corpus, and will not bring in the body, though he remains in office, an attachment shall go against him; but if he is gone out of office, an attachment shall not issue against his successor, the new sheriff, who did not make the return of cepi corpus; but a distringas is the method of enforcing him to bring in the body. And this latter was the present case, viz. that these writs of distringas had issued against the succeeding sheriff for not bringing in the body upon a cepi corpus, returned by a former sheriff, since gone out of office; and the court was applied to on behalf of the plaintiff, that they would direct the issues to be sold, and that the plaintiff should be paid his costs out of the money arising thereby.

In what way the issues levied thereon to be applied.

It was contended on behalf of the sheriff, against whom these writs of distringas had issued, that the act of parliament of 10 G. 3. c. 50. does not extend to writs of distringas in general, but only to such writs of distringas as are issued against members of parliament, or relate to privilege of parliament; and this, chiefly, by reason of the title and the preamble of this act; the former is, "for the further preventing delays of justice by reason of privilege of parliament." The latter is also in express terms confined to the inconveniences arising from the delay of "suits by reason of privilege of parliament."

But lord Mansfield held, that this act of parliament relates to all writs of distringas in general, and is not

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confined to such as concern privilege of parliament only.

The court ordered the issues to be sold, and the costs hitherto incurred by the fault of the sheriff to be taxed, and paid to the plaintiff out of the money arising thereby, and the residue to be retained in order to answer the event of the suit. *Raban v. Plaiflow*, Bur. 2726.

C H A P. V.

Of proceeding by Special Original in B. R. and by
original Quare Clausum fregit in C. B. from the
Commencement of the Suit to the Declaration.

IN the introduction to this work there are four several ways pointed out of bringing actions in the courts of King's Bench and Common Pleas, in all common cases; namely, by *bill* and by *special original*, in the former court; and in the latter, by *original* and *capias*, and by *original quare clausum fregit* and *summons*.

The different
ways of bringing
actions.

Having already shewn the mode of proceeding by *bill* in the King's Bench, and by *capias* in the Common Pleas, (which are the most usual ways of bringing actions,) from the commencement of the cause until defendant is brought into court, it only remains to consider in what manner the appearance of defendant is to be effected, when the proceedings are by *special original* in the one court, or by *original quare clausum fregit* and *summons* in the other.

There are few things relating to the practice of the courts more apt to confound and perplex the student or practitioner than the doctrine of writs; and as the mode of proceeding, either by *special original* in the King's Bench, or by *original quare clausum fregit* in the Common Pleas, is (comparatively speaking) but seldom resorted to, so it is, for the most part, but little understood.—We have already endeavoured to give the reader a general idea of its origin and meaning; and for further information thereon, refer him to the introduction to this work.

SECTION I.

*Of the Mode of proceeding by Special Original
in B. R.*

Upon suing out original writs, a *fine* is paid to the curitor, proportionable to the debt or damages mentioned in the præcipe (for the reason of this fine, and why not exacted in the Common Pleas, see the introduction, sec. 2.); the damages should therefore be laid at

Fine paid on
suing out ori-
ginals.

as moderate a sum as can be done with safety and propriety. If the debt or damages be under 40l. nothing is paid. If,

	<i>l.</i>	<i>s.</i>	<i>d.</i>
From 40 pounds to 100 marks (<i>i. e.</i> 66l. 13s.)	0	6	8
From 100 marks to 100 pounds - - -	0	10	0
From 100 pounds to 200 marks - - -	0	13	4
From 133l. 6s. 8d. to 166l. 13s. 4d. - -	0	16	8
From 166l. 13s. 4d. to 200l. - - -	1	0	0
And for every 100 marks more - - -	0	6	8
And for every 100 pounds more - - -	0	10	0

How to proceed.

Make out a *præcipe* (a) on unstamped paper, which, if it be an action on the case, must recite the whole cause of action particularly; carry it to filazer (Mr. Adams), who will make out the *capias* to the proper sheriff. For the sake of expedition, you may first prepare *capias* yourself, reciting the whole cause of action therein, as in *præcipe*; pay filazer, for first count in *præcipe*, 2s. 6d.; 1s. for every other; the same for the counts in *capias*; making in all 5s. for first count in *capias*, and 1s. for every other; pay also 4d. for filing original writ; get *capias* sealed, pay 7d. Affidavit of debt to be first made, and memorandum of warrant procured, as in other cases.

If defendant to be arrested.

If you mean to arrest defendant thereon, carry *capias* to proper sheriff's office; for warrant pay 2s. 4d. in Middlesex and London, but in other counties 2s. 6d.

If only to be served.

But if defendant is only to be served therewith, subscribe the common notice for appearance, taking care, instead of the words—"at Westminster," to say, "wheresoever we shall then be in England." See *ante*, ch. 3. sec. 1. C.

Of the alias and *capias* writs.

If not taken on or served with *capias*, before the return thereof, an alias and pluries may be sued out; and if defendant is not to be found in the county where *capias* issued, sue out a *testatum capias*; or it may be sued out in the first instance, without suing out any *capias*; but as it ought to be made out to warrant the *testatum*, the filazer must be paid for it.

Of defendant's appearance if not held to bail.

If the defendant is not held to special bail, he must enter his appearance in eight days after the return of the *capias*, alias, or pluries, according as the writ may be with which he is served,

(a) The *præcipe* (if it be an action on the case) runs thus: Middlesex, to wit. If A. B. make you secure, then put &c. C. D. late of Westminster in the said county, yeoman, that he be before us on the morrow of All Souls, wheresoever, &c. to shew for that whereas (here set forth the whole as if it were a count or declaration, and after the words, to the damage of the said A. B. of 100l. add.) as it is said, &c.

If in debt or covenant the *præcipe* is shorter, the substance of the count or declaration not being recited: it is thus; Middlesex, to wit, Command C. D. late of Westminster in the said county, yeoman, that justly, &c. he render to A. B. 80l. of lawful money, &c. which he owes to and unjustly detains from him, as it is said, &c. unless, &c.

and

and not eight days after the *quarto die post* of such return. It must be filed with the filazer; pay 2s. 6d.; file, at the same time, the memorandum, or minute of your warrant to defend.

If defendant does not duly appear, plaintiff may enter an appearance for him, according to the statute, on affidavit of the service of the writ, and stating therein the kind of writ, and when and where returnable, with which he was served. Plaintiff may appear for him.

But if the defendant be held to special bail, he must put in bail before a judge, within four days after the *quarto die post* of the return of the writ, if the arrest were in London or Middlesex; and *six* days if in any other county. But if the last day be a Sunday, he has all the next day to put bail in. Of putting in special bail.

Bail must be put in in the county where the *capias* issues. Where bail must be put in.

As to the mode of putting in bail, excepting thereto, adding, justifying, and the like, it is the same as in common pleas in otherailable actions; see ante, ch. 4. sec. 5. How to put in, except to, and perfect bail. The proceedings are with the filazer; but the fees are somewhat more.

So also the proceedings against the sheriff to rule him to return the writ or bring in the body, are similar to those stated in the last section of the last chapter. How to rule the sheriff, &c.

Observations on the above Mode of Proceeding.

The usual mode of proceeding in the court of King's Bench is by bill; but in particular cases it may be *expedient*, and it is sometimes even *necessary*, to sue by special original. It is often expedient, and sometimes necessary, to sue by original.

It is *expedient* to proceed by original when the plaintiff expects defendant to be litigious, and to delay execution by writ of *error*; because, when proceedings in B. R. are by *original*, the writ of error must, in the first instance, be made returnable in the *House of Lords*, which, from the immediate expence occasioned thereby, is often a check to such a step being taken; whereas, upon process by *bill*, error lies immediately from the King's Bench to the *Exchequer-chamber*, and afterwards to the *House of Lords*. When expedient.

It is *necessary* to proceed by *original* when there are two or more defendants, and any or either of them cannot be found so as to be arrested or served with process; When necessary, because,

because, in such case, plaintiff cannot declare against those defendants who have been duly served or arrested, until he has *outlawed* the others; and process of outlawry only lies upon proceedings by original. See ante, ch. 3. sec. 2. A. 5.

When such defendants have been regularly outlawed, and plaintiff declares, such outlawry must be suggested in the declaration.

Debt must amount to 10l.

To enable any party to proceed by special original, the debt must amount to 10l. Stat. 5 Geo. 2. c. 27. sec. 5.

In what actions plaintiff may sue by special original.

It was formerly doubted whether proceedings by original in B. R. could be had in debt or covenant; but I conceive that no such doubt can at this day be entertained, but that all personal actions, founded on *contract*, may be sued in this court either by bill or original.

The reason of proceedings by bill being preferred.

The reason of the former mode being adopted is, because it is not only less expensive in the course of the proceedings, but also because a fine, proportionable to the amount of plaintiff's demand, must, in the first instance, as above shewn, be paid to the king on process by original.

How process by original must be returnable.

All proceedings on special original must be before the king himself, wheresoever he shall be in England. All writs, notices, &c. used in the course of the cause, from the first to the last, as writs of inquiry, venire, distringas, &c. must be made returnable on a general return day, wheresoever, &c. and not "at Westminster," as in proceedings by bill. See ante, Introductory Observations, B. 3.

Original writ, whence it issues.

The original writ itself issues out of Chancery, and should be tested in the king's name, at Westminster, or wherever the Chancery is holden. 3 Blac. Com. 274.

How tested.

It may be tested at any time, even in vacation; because it is presumed, that the court of Chancery is always open. *Whitehead v. Buckland*, Sty. 402. *Chancy v. Butter*, 3 Keb. 213.

Teste must be after cause of action.

But the teste must be after the cause of action accrued, otherwise the writ is abateable. *Jones, one, &c. v. Burnet*, cited, 2 Bur. 967.

Must be 15 days between teste and return.

There should be 15 days between the teste and return; and, strictly speaking, the *capias* should not bear teste until the quarto die post of the return of the original, and there should be then 15 days between its teste and return; and this indeed must be observed, if the plaintiff proceeds to outlawry; but otherwise, both the original

ginal and *capias* may be made returnable the same day. There seems no specific time limited for the return of the original, though it is generally made returnable the same term, or the next to that in which it was issued; but if not returnable for two or three terms it does not vitiate, for it is no detriment to the defendant. Dyer, 175.

The teste of the *alias capias* should be the *quarto die post* of the return of the *capias*; teste of *pluries* the *quarto die post* of the return of *alias*, and so on; and there should always be 15 days between the teste and return of each writ. See ante, ch. 3. sec. 1. E. 6.

By the stat. 16 Car. 1. c. 6. f. 7. the morrow of the Ascension is a good return, although there be not 15 days between the fourth day of the said return and the effoin day of the morrow of the Holy Trinity.

But if the cause of action accrued in the vacation, and the teste of the *capias* was the last day of the preceding term, and so, *apparently*, sued out before the cause of action, yet it is regular; for in such case, the actual day of suing out the writ is to be attended to. See ante, ch. 3. sec. 1. E. 8.

Sometimes, for the sake of expedition, in proceeding to outlawry, if the instructions be carried to the curfitor within the first week of a term, and the cause of action will admit of it, (*i. e.* if it accrued early enough, for it must have accrued before the teste of the original,) he will make the original returnable on the first, or any other return of the preceding term. Tid. 14.

If the defendant is not held to bail, he must be served with a copy of the *capias* and not of the *original*. For the process, to be served according to the statute, must be process against the person. *Peter v. Reignier*, Bar. 410. See ante, ch. 3. sec. 1. A.

There should be also subscribed a notice to appear "on a general return, wheresoever," &c. See ante, ch. 3. sec. 1. C.

As to the time of appearing, putting in bail, and the like, see the preceding chapters.

Such is the mode of proceeding in order to bring the defendant into court by special original. We have before shewn how to effect his appearance by bill and *capias*. As the future proceedings, whether by bill or original, vary but little, we shall from henceforth consider them together; pointing out, in the progress of the work, such

No limited time for its return.

How the *alias*, &c. must be tested.

Morrow of Ascension a good return.

Capias may bear teste last day of term, though action accrued in vacation.

Sometimes original will be antedated.

If defendant not held to bail, he must be served with copy of *capias*, not of original.

With a notice to appear.

differences as may exist between them, contenting ourselves, at present, with observing,

Plaintiff must recover 50l. to entitle him to full costs,

except in certain cases.

If he wishes to amend his declaration, or original writ, how he may do it.

First, that although the expences of proceeding by special original are heavy, yet unless the plaintiff recover 50l. or upwards, he shall not, on taxing costs, be allowed any more or other costs than he would be entitled to in case he had proceeded by bill (except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed). And, secondly, That if plaintiff should find that the damages laid in the original are not sufficient to cover his demand, he may apply by summons, in the same way as in proceedings by bill, to amend his declaration; and afterwards, should judgment go by default, and a writ of error be brought, which would render it necessary to make the original correspond with the declaration, he may petition the master of the rolls, that the curfitor may be directed to amend the original accordingly; which petition is entitled in the cause, and is engrossed on a treble 6d. stamp. It is taken to the secretary's office in the Rolls, where 5s. 6d. is paid; and when answered, it is then taken to the curfitor, with the original, to be altered and re-sealed.

Want of original no error after verdict.

N. B. This is only necessary where error is brought after judgment by default; for if it be after verdict, the original need not be altered, as the want of an original cannot, in such a case, be assigned for error.

A mistake being discovered in one of the defendant's Christian names, leave was granted to amend the special capias in order that an application might be made to the master of the rolls to procure a new original. *Carr v. Shaw*, 7 D. & E. 299.

SECTION II.

Of the Mode of proceeding by original Quare Clausum Fregit and Summons in C. B.

The meaning thereof.

The original quare clausum fregit here mentioned, is precisely the same kind of writ as that on which the proceedings by capias are founded; the only difference is in the *process* which issues upon that writ, instead of its being by *capias* and *alias*, and the like, which is *process* against the *person*; it is by *summons* and *distringas*, which is the *process* against the defendant's *goods*.

Formerly,

Formerly, except in few cases, this was the only mode of compelling the defendant's appearance in civil actions, his person not being liable to an arrest. But the writ of *capias* being gradually introduced, and at length generally allowed, and being deemed the most effectual and preferable mode of proceeding, the process by *summons* and *distingas* fell almost into disuse.

It is, however, by no means taken away; and is in some cases preferable to the *capias*; namely, where the defendant cannot be met with to be arrested or served with process, at least without great delay and difficulty, and yet has goods that may be distrained; for in this case, *personal* service of the summons is not necessary; but it is sufficient for it to be left at defendant's house by the sheriff's officer, and the writ to be returned—*Notice to the defendant*; and if he does not duly appear upon the appearance-day of the return, the *distingas* issues, and afterwards an *alias*, and so on, till he does appear, or until sufficient goods have been distrained and levied to answer plaintiff's demand.

The mode of proceeding is as follows:

How to proceed.

Prepare memorandum, or minute of warrant to prosecute, as in other cases. See Introductory Observations, D. 3. Make out præcipe for the curfitor of the county where defendant has goods. Memorandum of warrant.

Middlesex, ss. Original quare clausum fregit for A. B. against C. D. late of Westminster, mercer. Trespass at Westminster, returnable before his Majesty's justices at Westminster, on the morrow of All Souls. Præcipe for curfitor.
T. S. attorney.

Take præcipe and memorandum of warrant to curfitor, who will furnish you with original signed and sealed; pay 4s. 6d. Go to proper sheriff's office for a summons; pay 2s. 4d.; give it to the officer you usually employ; pay him, for summoning each defendant, 5s. How to get original writ and summons.

Upon the appearance day of the return of the writ defendant should appear, which is done by entering appearance with the filazer of that county where writ was issued, and at the same time delivering memorandum of warrant to defend. The præcipe for appearance is— When and how defendant should appear.

Middlesex, ss. Appearance for C. D. late of Westminster, mercer, at the suit of A. B. to an original quare, and returnable on the morrow of All Souls. Præcipe for appearance.
P. R. attorney.

If defendant does not appear, (which you may know by searching at the filazer's, and no appearance being entered,) apply to the sheriff to return the original, which by *distingas*.

file with the *custos brevium*; pay 4d.; he will give you an abstract thereof on a slip of paper; carry it to the filazer; pay 6d. If notice to defendant be returned on writ, make out *distringas* on a half-crown stamp parchment, and a *præcipe* for the office; pay filazer for signing it, 2s. 6d.; seal, 7d.; go with it to the sheriff's office; get a warrant thereon to distrain defendant's goods to 40s.; give it to the sheriff's officer you employ; pay him 10s. for levying. On the return of *distringas*, which you may get returned at the office, sue out an *alias* in the same way; and then, if defendant has not appeared, move to increase the issues, either in court or in the Treasury Chamber. The court, on the *alias distringas*, will grant a rule to levy in proportion to the amount of plaintiff's debt, for it is at their discretion; sometimes, even to 40 or 50l. Carry the rule, with the *alias writ*, to sheriff. If not sufficient levied thereon, and defendant does not appear, sue out a *pluries*, and move, as before, for a farther increase of issues, which the court will now grant to the amount of the debt and costs; carry rule, as before, with *pluries writ*, to the sheriff, who will make out his warrant accordingly. When the levy has been made, get *pluries writ* returned; and if defendant has not appeared, move to sell the issues, and apply them to payment of defendant's debt and costs, pursuant to statute 10 Geo. 3. c. 50.

By *alias distringas*.

How to increase issues.

Pluries distringas.

How to apply the issues.

Motion in court upon 10 G. 3. c. 50.

If defendant should have appeared at any time after the passing of the *distringas*'s, and before a rule obtained to sell the issues, then move the court, under the 10 G. 3. c. 50. to sell so much of the issues as will be sufficient to pay plaintiff his costs incurred by reason of such *distringas*, and *alias distringas*, or as the case may be.

That act extends to all writs of *distringas*.

The act of 10 Geo. 3. c. 50. extends to all writs of *distringas* in general; though, by the preamble of the statute, it seems only to refer to such as issue against members of parliament. *Raban v. Plaistow*, Bur. 2726.

When defendant must appear, and how the days are reckoned.

The return day of a *clausum fregit*, and the *quarto die post*, are both reckoned *inclusively*; nor is there any difference whether the return day be on Sunday, or any other day.

The defendant was served with a *clausum fregit*, returnable in four weeks from Easter-day; the return was Sunday April 20th; the defendant not appearing on the Wednesday following, the plaintiff, on the Thursday, sued out a *distringas*; on that day the defendant entered an appearance. On Friday morning the plaintiff's attorney

ney

ney levied 40s. under the distringas, on the defendant's goods.

Kerby, serjeant, obtained a rule to shew cause, why these issues should not be repaid to the defendant, with costs, on the ground, that the return day being Sunday, the defendant had till Thursday to appear, and as the distringas issued on that day it was irregular.

To this it was answered, that by the uniform practice of the court, the defendant was bound to appear *within four days of the return of the writ*, which are *inclusive* both of the return day and the *quarto die post*, and that Sunday was to be considered like any other return day.

The court, after consulting the secondaries as to the practice, were of opinion against the defendant. Rule discharged. *Fano v. Coken*, 1 H. Blac. 9.

After appearance, plaintiff may declare upon this process, in any county (though different from the writ) and in any cause of action; and may, after judgment, if necessary, purchase a *special original*, to warrant the proceedings.

☞ Having now shewn the mode of bringing defendant into court, in all common cases, whether the action be bailable or not bailable, and whether the proceedings be in the usual way, by bill in the King's Bench, and *capias* in the Common Pleas, or by special original in the former court, and original quare clausum fregit and summons in the latter; the next step to be taken is, to set forth the plaintiff's charge or cause of action against defendant, fully and particularly in the DECLARATION. And as, from this period of the suit, in all the above cases, the proceedings which hitherto have been widely different, and therefore separately considered, are nearly similar, they will hereafter be treated of under one head.

CHAPTER VI.

Of the Declaration and its Incidents.

SEC. I. *Of the Declaration.*

- (A) The Time of declaring.
- (B) Declaring in Chief.
- (C) Declaring *de bene esse*.
- (D) Declaring by the bye.
- (E) Engrossing and filing Declaration.
- (F) Notice of Declaration.
- (G) Declaring where one Defendant only has appeared.
- (H) Declaration varying from Process.
- (I) Consolidating Declarations and striking out Counts.
- (K) Defects cured by Declaration.
- (L) The Rule to declare.
- (M) Of intitling Declarations and of the Memorandum.

SEC. II. *Of the Venue.*

SECTION I.

Of the Declaration.

Declaration,
what.

THE Declaration or Count is nothing more than a statement in writing of the cause of complaint which the plaintiff has against the defendant; setting forth with a degree of accuracy the time and place, when and where, and the

the manner in which this cause of complaint arose, together with the damage or injury sustained in consequence thereof. After the declaration follow the pleadings between the parties.

Formerly the declaration and pleadings were carried on at the bar of the court *ore tenus*; afterwards the declaration was reduced into writing and delivered to defendant's attorney, who took a copy, and charged his client therewith; but much inconvenience arising from this, and particularly from their neglecting to return the declaration to plaintiff's attorney, the rule of court *Trin. 12 W. 3.* was made, whereby the practice was first introduced of plaintiff's attorney delivering only a copy of the declaration to defendant's attorney, and charging him for the engrossing and duty on the back thereof.

That the defendant may not be subject to the caprice or negligence of his adversary, the courts have fixed a certain limited time within which plaintiff must declare, or in default thereof judgment of *nonpros* may be signed against him. — For an explanation of this kind of judgment, see title *Judgment of Nonpros*.

How made formerly.

Origin of present practice.

(A) The Time of declaring.

The time in which plaintiff must declare is,

Time of declaring.

In B. R.

In C. B.

Before the end of the term next ensuing the return of the process, or defendant may sign *nonpros*. And this in all cases, (except *replevin*,) without having given any rule to declare. 13 Car. 2. §. 2, c. 2. §. 3.

Same as in B. R., only the defendant must, at the end of such ensuing term after return of process, or in four days afterwards, give plaintiff a rule to declare, and cannot sign *nonpros* until that rule is expired: for if no such rule be given, plaintiff in this court has till the *effoin* day of the third term to declare in. R. Hil. 9 Ann. *Stewart v. Harding*, P. R. 121.

By the general rule of law a plaintiff must declare within twelve months after the return of the writ, or he will be out of court. But by the rules of the courts, if he do not deliver his declaration within two terms, defendant may sign judgment of *nonpros*. If, however, no such judgment be signed, plaintiff may still deliver his declaration at any time within the year. *Worley v. Lee*, 2 D. & E. 123. *Penny v. Harvey*, 3 D. & E. 123. *Sherston v. Hughes*, 5 D. & E. 36.

Within two terms;

or if no judgment, within the year.

It

TIME OF DECLARING. [Ch. VI. (A)]

It was formerly held, That if a declaration were not delivered by the last day of the second term, that is, on or before the sitting of the court the last day, although defendant had not signed *nonpros*, yet that it was at his option to receive the declaration afterwards, nor could he be compelled so to do.

Barnes v. Geering, 12 Mod. 217.

And still is it upon this ground, that a new count cannot be added to a declaration after the second term, because that would be tantamount to a new declaration; and plaintiff could not declare after two terms. *Nisbett v. Griffiths*, Say. 97.

In *B. R.* plaintiff has only to the end of the second term to declare in, whether called upon by rule or not; but in *C. B.* he has till the effoin day of the third term, if not called upon by rule. *P. R.* 121.

In both courts plaintiff has two terms to declare in after bail is complete.

But if there be a treaty between plaintiff and defendant, he is not obliged to declare within that time. *Walter v. Steward*, 3 Will. 455.

If the defendant wishes to compel plaintiff to declare, he may obtain a rule for that purpose; and if at the expiration thereof he does not declare, he may obtain another, until such rule is drawn up for him to declare *peremptorily* by a certain time, which must be obeyed; but plaintiff is not obliged to attend to any other than such peremptory rule: it is a motion of course signed by counsel. This is the rule calling upon plaintiff to declare; but there is also a rule to declare, obtained by plaintiff, for further time to declare in; which see *post* (L).

Formerly, when the pleadings between the parties were carried on *ore tenus* at the bar of the court, plaintiff could not declare until defendant had actually appeared in court. So indeed for a long time after the introduction of the practice of declaring and pleading by attorney, no declaration could be delivered till the defendant was brought into court; that is to say, until common bail was filed, or appearance entered in actions not bailable, or special bail put in and perfected in bailable actions. The only way, therefore, of declaring at that time was, declaring, as it is termed, *in chief*, that is to say, after the defendant has appeared. But for the sake of expediting justice, it was ordered by rules of court, that plaintiff might declare immediately upon the return of the process, without waiting for defendant's appearance, which was called declaring *de bene esse*, or *conditionally*: that is to say, *conditionally* until defendant had put in and perfected bail,

Reason why no new count added after second term.

Rule to declare how necessary in both courts.

Two terms allowed after bail put in. How if a treaty between the parties.

Of compelling plaintiff to declare by rule.

Explanation of the different ways of declaring.

Of declaring in chief.

Of declaring *de bene esse*.

bail, if the action were bailable, or until he had filed common bail, or entered an appearance if the action were not bailable.

There are, therefore, now two ways of declaring, namely *in chief*, and *de bene esse*, in all actions founded upon process already issued against the defendant.

But there is further a third way of declaring in actions wherein no process has issued, and this is called declaring *by the bye*, which can only be done when the defendant is actually in court; for he is not till then supposed to be in custody; and this mode of declaring is grounded upon the principle of the defendant being already in custody, and therefore no occasion for any fresh process to warrant the declaration.

We shall now proceed briefly to shew the practice in each of the above ways of declaring.

(B) Declaring in Chief.

Declaring in chief is when the plaintiff declares after the defendant has appeared; and this may be either when defendant has himself appeared, or when plaintiff has appeared for him according to the statute; for until defendant is regularly brought into court, plaintiff cannot declare in chief. *Smith v. Painter*, 2 D. & E. 719. *Cook v. Raven*, 1 D. & E. 635. So in *C. B. Mathews v. Stone*, Bar. 242.

How, if Defendant has appeared.

B. R.

In every cause in which special or common bail shall be filed, and notice thereof given to the attorney for the plaintiff, a copy of the declaration shall be delivered to the defendant's attorney, who shall pay for the same according to the usual rate; but if the attorney for the defendant, or his clerk in his absence, refuses to pay for such copy; or if it shall happen that the abode of the defendant's attorney be unknown to the plaintiff's attorney, then it shall be lawful to leave such copy with the officer of this court appointed for affiling declarations, and notice thereof shall, without delay, be given to such defendant

C. B.

If the defendant's attorney has appeared or put in bail, the declaration must be delivered to him; whereupon he must pay for the same duty and warrant; or on refusal by him, or his clerk in his absence, or if his abode be unknown, it may be filed in the Prothonotary's office on payment of 2s. a count, or 8d. per sheet; and then on notice thereof to the defendant or his attorney, (and from the time of giving such notice, and not before, declaration is well delivered,) and on rule to plead being given, judgment for want of plea may be signed, and no plea may be received till the declaration is taken out of the office. *R. T. 12 W. 3.*

The only two ways where process has issued.

Of declaring by the bye.

Meaning there-

(B) in. 41
What.

Copy of declaration to be delivered to defendant's attorney.

Who is to pay for same. If he refuses, or place of abode not known,

copy may be filed in the office, and notice thereof given to defendant or his attorney.

defendant or his attorney; and such declaration shall be held well delivered from the time of such notice only. *R. Trin. 2 G. 2.*

How, if Plaintiff has appeared for Defendant according to the Statute.

Copy of declaration to be left at the office,

and notice given to defendant or his attorney, or left at defendant's last place of abode. What notice shall express.

In case defendant does not plead thereto, judgment may be signed.

Declaration well delivered from time of notice.

When judgment signed.

Notice of inquiry may be given to defendant, or left at his last place of abode, and held good.

In all causes, when a copy of the process is served upon any defendant or defendants, and an appearance is entered, or common bail filed for such defendant or defendants by the plaintiff's attorney pursuant to the statute, the plaintiff's attorney in such case shall leave a copy of the declaration in the office with the proper officer appointed for that purpose, and likewise give notice thereof to the defendant or defendants, by delivering an English notice, written in secretary hand, to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; in which notice shall be likewise expressed the nature of the action, and at whose suit prosecuted (a), and the times limited by the rules of this court for such defendant or defendants to plead to such action; and that in case such defendant or defendants do not plead to such declaration by such limited time so to be expressed in such notice, judgment will be entered against such defendant or defendants by default; and from the time of giving such notice as aforesaid, such declaration shall be deemed well delivered to such defendant or defendants, and not otherwise.

*And in case such defendant or defendants, after such notice given, do not plead by the time the rules for pleading are out, the plaintiff may, in such case, sign his judgment (b) without any other or further calling for a plea, and thereon give notice of executing his writ of inquiry, either by delivering a notice in writing to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; which shall be a sufficient notice to such defendant or defendants of the time of executing such writ of inquiry. *R. Trin. 1 G. 2. B. R. Mich. 1 G. 2. C. B.**

For further explanation of these rules, see post (F), (G), &c.

(C)

(C) Declaring *de bene esse*.

What.

When plaintiff declares after the return of the process, but before the defendant has appeared, it is called *declaring de bene esse*, or *conditionally*; that is to say, conditionally until defendant has filed common bail in *B. R.* or entered an appearance in *C. B.* if the action be not bailable; or until he has put in and perfected bail, or (in case bail has been put in but not justified) until bail have justified, if the action be a bailable one.

(a) In *C. B.* the rule says, the notice must signify in whose office such declaration is left.

(b) In *C. B.* the rule says, that a rule to plead must be first given. See *R. Mich. 1 G. 2. C. B.*

The

The latest rules respecting this practice of declaring *de bene esse* are the following:—

B. R.

It is ordered, that upon all process to be issued out of this court returnable before the last return of any term where no affidavit shall be made and filed of the cause of action, pursuant to the acts of parliament for preventing vexatious arrests, the plaintiff may file or deliver the declaration *de bene esse* at the return of such process, with notice to plead in eight days after the filing or delivery thereof; and if the defendant doth not file common bail and plead within the said eight days, the plaintiff, having filed common bail for such defendant according to the said act, may sign judgment for want of a plea; provided that such declaration be delivered or filed, and notice thereof given four days exclusive before the end of such term, and a rule to plead be duly entered. Rule Trinity Term 22 G. 3.

Upon process to be issued and made returnable as aforesaid, where an affidavit shall be made and filed of the cause of action pursuant to the said act, the declaration may be filed or delivered *de bene esse* at the return of such process, with notice to plead in four days after such filing or delivery, if the action be laid in London or Middlesex, and the defendant lives within 20 miles of London, and in eight days if the action is laid in any other county, or the defendant lives above 20 miles from London; and if the defendant puts in bail, and doth not plead within such times as are respectively before mentioned, judgment may be signed: provided that such declaration be delivered or filed, and notice thereof given

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C. B.

Upon process returnable the first, second, or third return of any term, the declaration may be delivered *de bene esse* at the return of the process, with notice to plead, if in London or Middlesex, (and defendant lives within 20 miles of London,) in four days: but if the plaintiff declares in any other county, then it may be delivered *de bene esse*, with notice to plead within eight days after declaration delivered, either where there is special or common bail filed. Rule Trin. 8 G. 3.

How in B. R. in actions not bailable.

How in C. B. in actions whether bailable or not.

How in B. R. in actions bailable.

four days exclusive before the end of such term, and a rule to plead be duly entered. Rule Trinity Term 22 G. 3.

Explanation of
rule Trin.
22 Geo. 3. in
B. R. and
8 Geo. 3. in
C. B.

It is observable that in the above rule, *Trin. 22 G. 3.*, the words are "upon all process returnable before the *last* return of any term;" and in rule 8 G. 3. in C. B. they are "upon process returnable the 1st, 2d, or 3d return of any term, plaintiff may file or deliver declaration *de bene esse*, with notice to plead," &c. From which words it has been understood, that no declaration could be filed or delivered *de bene esse*, except upon process returnable before the *last* return of the term. Thus in a late ingenious book of practice—*"Upon process returnable the last return of the term, the declaration cannot be filed or delivered de bene esse."* and the rules of court are referred to in support of this doctrine. *Tidd. 233.* But with deference I conceive, that the operation of the above rules of court is not to confine declarations *de bene esse* to process returnable as therein mentioned, but only to regulate the time wherein defendant is to plead to such declarations on process so returnable. Plaintiff may declare *de bene esse* upon any process whenever returnable; but if it be not returnable before the last return of the term, the notice to plead must not be in four or eight days, as mentioned in the rules (since those rules do not extend to such declarations *de bene esse*), but the defendant will, in that case, be entitled to an imparlance, and the notice should be to plead within the first four days of the next term. Agreeable to this is the determination in the case of *Abbey and Martyn* in 1 C. B. T. R. 523. where on process returnable the last return of Trinity Term, a declaration was filed *de bene esse*, with notice to plead within the first four days of Michaelmas term, and it was held regular. No reason indeed is given, but it is submitted, that it might have been upon the principle above mentioned, namely, that the rules of court only govern the time of pleading to declarations *de bene esse*, returnable before the last return, and do not mean to prevent plaintiff's declaring *de bene esse* upon any process returnable upon any subsequent return, provided the notice to plead be accordingly within the first four days of the following term.

At what time.

A declaration *de bene esse* must be filed or delivered before the defendant has appeared, and even before the time for his appearing or putting in bail is expired. *Fotherby v. Lloyd*, Bar. 342.

For declaring after appearance is called declaring in chief. And if plaintiff neglect to declare *de bene esse* before the time for defendant's appearance is out, he must first bring defendant into court by filing common bail, or entering an appearance for him according to the statute, and then declare against him in chief. *Smith v. Painter*, 2 D. & E. 749. That is, provided the action be not bailable; for if it be, plaintiff must then proceed against the sheriff, or upon the bail-bond.

So that the plaintiff can never deliver declarations *de bene esse* after the expiration of the time allowed to plead; and if he do, and proceed to judgment, it will be set aside. *Baker v. Cooper*, 6 D. & E. 548.

In *B. R.* the return day of the writ is the soonest that a declaration *de bene esse* can be filed or delivered; and where an original is returnable on the effoin day of term, declaration cannot be delivered *de bene esse* till the first day of term. *Burgh v. Dixon*, 14 G. 2.

How soon it
may be filed,
&c.

But in *C. B.*, although declaration may be delivered *de bene esse* on the return day, and be good for many purposes, yet, being in favour of plaintiff to expedite his cause, it cannot be delivered so as to charge defendant with paying for the declaration till the appearance day; for the four days of grace are allowed defendant to make an end of the cause by payment of the debt or otherwise; and if this practice were to be countenanced, an attorney might delay the service of the writ till the night before the return, and charge the defendant with the costs of declaration as well as process. *Golding v. Grace*, Black. 750.

On return day.
On effoin day,
how far good.

And in *B. R.* the master will not allow costs of declaration delivered under such unfair circumstances.

If a writ be returnable the last day of one term, and defendant does not justify bail until the fourth day of the next, he is not entitled to an imparlance to the third term, though plaintiff do not deliver declaration *de bene esse* before the effoin day of the second term; for no laches is imputable to plaintiff for not declaring until defendant is perfectly in court. *Rolleston v. Scott*, 5 D. & E. 372.

The eight days time when defendant is to plead reckons from the delivery of the declaration, be it sooner or later. *Shadwell v. Angel*, Burr. 55.

Time for plead-
ing how
reckoned.

So in *C. B.* if a declaration is delivered *de bene esse* on the effoin day of the return, defendant is entitled to eight days time to plead (though it be a case that would otherwise require only four); if *after* the effoin day, and on or before the appearance day of the return of the writ, the defendant is entitled to four days *from* the appearance day; and if deli-

In *C. B.*

vered

vered after the appearance day, then to four days *after* delivery. Blac. 1243.

If declaration delivered too late, whether waiver of bail.

Although the delivery of a declaration *de bene esse* after the time expired for putting in bail is a bad delivery, yet it is not a waiver of exception to bail; but demanding a plea is; because the latter is admitting the defendant to be in court and in a condition to plead. *Lister v. Wainhouse*, Bar. 92.

If defendant do not plead, &c. plaintiff may sign judgment.

Where declaration is delivered *de bene esse* at the return of process, with notice for defendant to plead within eight days after such delivery, if the defendant do not file common bail and plead within such eight days, plaintiff may sign judgment for want of a plea, having first filed common bail for defendant, and a rule to plead having also been duly entered. *Shadwell v. Angel*, Burr. 55.

Care should be taken to *mark* the declaration accordingly that it is delivered *de bene esse*, otherwise it will be irregular. *Evans v. Tillam*, Bar. 257.

(D)

(D) Declaring by the Bye.

Declaring by the bye.

Declarations by the bye are not grounded on any original writ or process, but upon the defendant's being already in court, either at the suit of plaintiff himself or some other person. Now there are three ways in which a defendant may be in court: 1st, He may be in the actual custody of the marshal as a prisoner: 2d, He may have *voluntarily* come into court at the suit of any person, by having himself filed common bail and the like: or, 3d, He may have been *forced* into court by plaintiff's having filed common bail, or entered an appearance for him according to the statute.

In B. R. Who may declare by the bye.

Now in the two first cases, by the practice of the King's Bench, *any* person may deliver or file declarations against him by the bye, provided they be delivered or filed within the same term that the process against defendant (upon which he is either so in custody, or to which he has so voluntarily appeared) is returnable. *Sulyard v. Harris*, Burr. 2180.

And the plaintiff himself may declare by the bye against him at any time before the end of the next term after the return of the process. *Smith v. Muller*, 3 D. & E. 627.

But in the 3d case, where defendant has been *forced* into court, no other person except the plaintiff himself, can deliver a declaration by the bye against him. *R. Mich.* 10 G. 2. *Wallis v. Smith*, Cal. Temp. Hard. 207.

In C. B.

The above is the practice of the court of King's Bench: but that of the Common Pleas is otherwise; for there, in

all cases, no person can declare by the bye, except the plaintiff himself; and he must do it within the same term in which the writ is returnable. *Methwin v. Pople*, Caf. Prac. C. B. 6. *Dunn v. Hutt*, Bar. 346.

Which rule also prevails in *B. R.* when the action is by original. *Tidd*. 217.

N. B. The reason of this difference in the practice of the courts seems to be, that in *B. R.*, when defendant is actually in court, either by having filed common bail, or by putting in special bail, he is presumed to be in the custody of the marshal, ready to answer all declarations that may be brought against him by any person whatsoever; whereas in *C. B.* he is only in court *quoad* the plaintiff.

If a *joint* action be brought, one of the plaintiffs declaring severally by the bye, will be deemed as a stranger, and can only be done in *B. R.*, subject to the above rules. *Sulyard v. Harris*, *Burr*. 2181.

How in joint actions.

So in *B. R.* in an action at the suit of the baron only, a declaration may be delivered by the bye at the suit of himself and *feme*, and *vice versa*; but not so in *C. B.* *Reeks & Ux. v. Robins*, Bar. 337.

In actions by husband.

So in *B. R.* upon process with an *ac etiam* at suit of plaintiff as executor or assignee, he may declare by the bye in his own right: but not so in *C. B.* unless it were a general *clausum fregit* without an *ac etiam*.

By executor.

But in all cases where defendant comes in by rule of court and not by process, he is not compellable to receive a declaration by the bye; as where a person by rule of court is made defendant in ejectment and files common bail, and other similar cases. *Styles*, 47.

How if defendant is in court by rule of court.

A declaration by the bye pre-supposes a declaration in chief, and therefore no declaration by the bye can be delivered until plaintiff has declared in the original action; so that if plaintiff sues out a writ *qui tam*, and declares in his own name before any declaration in the *qui tam* action, it will be bad.

So if he holds defendant to bail in assumpsit, and declares in trover, as if by the bye, it is irregular. *Tetherington v. Golding*, 7 D. & E. 81. *Delves v. Strange*, 6 D. & E. 158. See cont. *Holmes v. Small*, Caf. Prac. C. B. 58. *Con. Philips* case, 1 Crom. 96. See *post* (E).

(E) Engrossing, filing, and delivering Declaration.

(E)

The declaration should be engrossed on treble-penny stamped paper; charge engrossing 4d. per sheet, (seventy-two

two words making a sheet,) beside duty, which is 3d. per sheet, but nothing for paper.

For the Warrant to defend, charge

In B. R.

In all actions 4d.; and for filing common bail according to statute, 7s. 2d.

In C. B.

In debt, detinue, and trespass, 4d.; in other actions, 8d.; and for entering appearances according to statute, 5s. 10d.; if at suit of attorney, 7s. 2d.

Besides which, you should indorse on declaration the time for defendant to plead thereto; and if the declaration be filed or delivered *de bene esse*, it should be indorsed accordingly; as thus, if plaintiff declare in chief:

Form of indorsement, if declaration be in chief,

The defendant is to plead hereto in four (or eight days, or within the first four days of next Michaelmas term, as the case may be,) otherwise judgment.

If plaintiff declare *de bene esse*, thus:

If declaration be *de bene esse*.

This declaration is filed (or delivered as the case may be) conditionally until common bail be filed (or an appearance entered, or bail above be put in and perfected, as the case may be); and defendant is to plead hereto in four days, (or eight days, or as the case may be,) otherwise judgment.

Indorsement not necessary if declaration be filed, but notice must be given.

But this indorsement is not necessary when the declaration is filed in the office, because in that case a notice must be given to the defendant, or left at his last usual place of abode; which notice must express the nature of the action, at whose suit, and the time allowed for pleading, as follows;

Form of Notice of Declaration.

Form of notice of declaration.

Take notice that a declaration was this day filed with the clerk of the declarations in the King's Bench office, in the Inner Temple, London, (if in B. R.; or with the Prothonotaries at their office in Tanfield Court, in the Temple, London, if in C. B.) conditionally until special bail is put in and perfected, (or until common bail be filed, or until common appearance be entered, as the case may be,) as of this present Michaelmas term, against you, at the suit of the above named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of 100l.; and unless you plead thereto in four days (or as the case may be) from the date hereof, judgment will be signed against you by default. Dated the 28th day of January 1794.

Yours, &c.

J. S. Attorney for plaintiff.

To Mr. C. D., the above defendant.

If

If declaration be filed in *chief*, then the notice is as above, only omitting the words "*conditionally until bail be put in and perfected.*"

As the time wherein defendant is to plead must be accurately indorsed on the declaration, or inserted in the notice, it is extremely material that plaintiff should be well acquainted therewith.

How indorsed as to the time allowed for pleading.

Whenever declaration is delivered or filed in *chief*, defendant is to plead in *four* days from the delivery thereof; provided the venue be in London or Middlesex, and the defendant lives within 20 miles of London. But if the venue be not in London or Middlesex, or if the defendant does not live within 20 miles of London, then he is to plead in *eight* days, and this in both courts, whether the action be bailable or not.

How, if plaintiff declare in *chief* in both courts.

But whenever the declaration is delivered or filed *de bene esse*, the time of pleading is different in the two courts; for in *K. B.* if the action be *not* bailable, it is *always* eight days; but if it be bailable, then four or eight, according to the above rule. But in *C. B.* no such distinction prevails, but whether the action be bailable or not, the time for pleading is four or eight days, the same as when plaintiff declares in *chief*.

How, if plaintiff declare *de bene esse* in *B. R.*

How in *C. B.*

It is, however, to be remembered, that in both courts, and in all cases, if the declaration be not delivered, or notice given four days exclusive before the end of the term, defendant is entitled to an imparlance; and therefore the time for pleading is within the first four days of the next term.

How, if defendant be entitled to an imparlance.

See *post* Ch. VII. Sec. VI. in what case defendant is entitled to imparlance.

But it is not absolutely necessary for the notice to plead to be indorsed on declaration, or given when declaration is delivered; for if given afterwards, provided it be a proper notice as to the time allowed for pleading, it will be good. *Anon. C. B. 2 Wil. 137.*

Of filing and delivering declaration.

If the defendant's attorney be known, a copy of the declaration must be delivered to him; and if he be a country attorney, then it ought to be delivered to his agent in town: for if it be delivered to the defendant himself, or left in the office, unless the attorney refused to pay for it, it will be a bad delivery. *P. R. 126. White v. Edwards, Ray. 1403. 8 Mod. 379.*

So if the defendant's place of residence be known, it is irregular to file the declaration in the office. *Oldham v. Burrell, 7 D. & E. 26.*

But if the place of abode of defendant's attorney or of defendant be not known, or if such attorney refuse to pay for

When filed.

for declaration, then a copy must be filed in the proper office.

So if plaintiff files common bail, or enters appearance for defendant according to the statute.

If such defendant, for whom plaintiff so appears, be a practising attorney, he must not deliver declaration to him at his chambers, but must leave it in the office. *P. R. 128. Heber v. King.*

At what time.

A copy of declaration ought to be delivered or filed before nine in the evening, otherwise defendant will be entitled to an imparlance; and judgment, if signed, will be set aside. *P. R. 123. Bayly v. Dennis.*

Four days before end of term.

Declaration should be delivered four days exclusive before the end of the term, (i. e.) on the eighth, if term ends on the twelfth, or defendant will be entitled to an imparlance. *P. R. 125. Porter v. Barnes.*

Not on Sunday.

Delivery of a declaration on a Sunday bad, though cases may be found to the contrary. *Walker v. Town, Bar. 300. Morgan and Johnson, C. B. T. R. 629.*

A declaration may be delivered by the bye after payment of debt and costs in the original action, provided it be delivered of the same term in which writ is returnable. *Hand v. Willett, P. R. 144.*

So after a plea in abatement and entry *quod billa cassetur*; for defendant is in court during the whole term. *Miller v. Andrews, 5 D. & E. 634.*

(F) (F) The Notice of Declaration, and paying for same,

In all cases where declarations are left or filed at the office, a proper notice thereof must be given to defendant or his attorney; for if declaration be left in the office, and notice given to defendant's attorney, it is tantamount to a delivery of it to him. *Thomas v. Bushell, Cas. Prac. C. B. 84.*

How served.

If not delivered to the attorney, it must be left at the last or usual place of abode of defendant.

If neither the attorney nor the defendant's last place of abode can be found, application may be made to the court, that notice left at the office may be good, unless the bail, if any, shew cause to the contrary. *Miller v. Parsons, Bar. 307.*

Notice has been held good when put under the door of defendant's house, which was empty and shut up; court thinking it a trick of defendant's to avoid process. *Wood v. Dedgson, Bar. 278.*

But

But where it was merely put under the latch of defendant's door, without its appearing that the person who left the notice knocked or endeavoured to open the door, it was bad. *Talbot v. Oldham*, Bar. 411.

If the action be against two or more, notice must be given to all the defendants, or it will be bad. *Coulson v. Turnbull* and others, Bar. 246. *Kingdon v. Horn* and another, Bar. 293.

It must be served before nine in the evening, and before rule to plead is given. P. R. 131. & 135. 121. *Lane v. Elliot*. *Gray v. Saunders*.

It must not be served on a Sunday. *Morgan v. Johnson*, C. B. T. R. 629.

This notice must be in writing. P. R. 130. *Hale v. How made*. *Breedon*.

It ought to follow the process: so that where a person residing in *Dorchester* took lodgings in *London* for three or four days, and was there served with process, although he immediately after went home into the country, notice of declaration left for him at his lodgings was held good. P. R. 129. *Poulter v. Skinner*.

It ought to specify technically the nature of the action, as trespass, trespass on the case upon promises, trespass on the case for tort, debt, covenant, and the like, or it will be insufficient, although, perhaps, it may describe the cause of action so as to be understood by common people.

Its contents,

As if it says that plaintiff declares on a note of hand; or that it is an action for work and labour done by plaintiff for defendant; though intelligible in common parlance, yet the notice is bad; because the nature of the action, as debt or trespass on the case, is not technically expressed. *Taylor v. Sherman*, Bar. 299. *Graves v. Wise*, 2 Wil. 84. *Bartholomew v. Golding*, Bar. 291.

It must shew the nature of the action with sufficient certainty; so that merely to say in an action on the case, without mentioning whether upon contract or for tort, is not sufficient. P. R. 131. *Parsons v. Smith*.

Nature of action.

But it need only mention the nature of the action, for the declaration will shew the particulars. P. R. 133. *Skin v. Gwinnet*.

It should further specify at whose suit prosecuted, and the time allowed for pleading thereto; and that unless defendant plead in that time, judgment will be signed.

At whose suit.

Notice to plead in four days when defendant is entitled to eight, bad; and judgment set aside, though not signed till after the eight days. P. R. 135. *Brady v. Baldock*.

So

Dated.

So it should be properly dated ; for it will be bad for want of a date. *Cromwell v. Goodwin*, Bar. 409. P. R. 134. *Hannaford v. Holman*.

For if the notice be irregular, and plaintiff signs judgment for want of a plea, defendant may set it aside on motion for such irregularity. *Graves v. Wise*, 2 Wil. 84. Bar. 291.

When necessary in B. R., in C. B.

In B. R. this notice is necessary in all cases ; but in C. B. it has been held, that notice of a declaration being left in the office, is not necessary in bailable actions, where defendant's attorney has put in bail, for he ought to search for it ; but in actions not bailable it is. P. R. 149. *Simmons v. Shannon*, Blac. 725. Notes to Rules and Orders, 221.

Sed 2. and *vide Simmons and Shannon*, as reported 3 Wil. 147.

How it operates on declaration.

The declaration is only well delivered from the time of the notice ; and is, therefore, to be considered as of that term in which notice was given. *Field v. Gooding*, 1 Barn. 46.

And this, whether the declaration be in chief or *de bene esse* ; for there is no distinction, notwithstanding it appears otherwise in *Gray v. Saunders*, Bar. 248. So that defendant has four days after notice of declaration to plead in abatement. *Hutchinson v. Brown*, 7 D. & E. 298.

Interlocutory judgment was set aside for defect of notice. In the term following (Michaelmas) plaintiff gave fresh notice, and for want of plea signed judgment : which second judgment was set aside on the ground that the declaration was only well delivered from the time of serving second notice ; and that the writ being returnable in Easter, declaration was delivered too late, and plaintiff must begin again. *Bartholomew v. Goulding*, Bar. 291.

Former practice.

Formerly, therefore, when it was held, that plaintiff must declare before the end of the next term after return of process, or he would be out of court ; although declaration was filed within that time, yet if the notice was not delivered until after such second term, though even before the effoin day of the third, it was held bad. *Pritchard and Lewis*, Bar. 304.

How altered.

Afterwards it was determined, that if the declaration were filed within the second term, notice given *before* the effoin day of the following term was good. *West and Radford*, Bur. 1452.

Present practice of serving notice as to time.

But the practice now is, that if the declaration be filed within the second term, notice of declaration served *on* the effoin day of the third, or indeed at any time within the 12 months from the return of writ, will be good, provided defendant has not signed judgment of *nonpros* ; because plaintiff

tiff has all that time to declare in *before* he is out of court. *Worley and Lee*, 2 D. & E. 112. *Penny and Harvey*, 3 D. & E. 123.

Paying for Declaration.

In all causes depending in either court, the defendant's attorney is to receive and pay for a copy of the declaration, whether the same be delivered by plaintiff's attorney, or left in the office before the defendant be permitted to plead. R. 10 G. 2. K. B. 12 W. 3. C. B.

Of paying for declaration.

When therefore the declaration is delivered, defendant's attorney must pay for it; as also the *4d.* for the warrant, as charged thereon: if he refuses to pay either, plaintiff cannot sign judgment (*Oneale v. Price*, 4 D. & E. 370.), but he must leave the declaration in the office, and proceed by giving a rule to plead, and demanding a plea, and for want of it, sign judgment, taking care not to receive a plea till the copy of declaration is paid for.

So also in C. B. agreeable to the express words of the rule of court, T. 12 W. 3.

So where declaration is in the first instance filed, and notice thereof given, defendant must take it out of office and pay for it, before plaintiff is obliged to receive his plea; and though defendant appears and tenders a plea, yet plaintiff may sign judgment for want of declaration being taken out of office and paid for. 1 Wil. 173. *Keeling v. Newton*.

(G) Declaring where one Defendant only has appeared.

(G)

In both courts, and in all actions, whetherailable or not, if there be two defendants against whom plaintiff wishes to declare upon a joint contract or cause of action, and one only appears or puts in bail, plaintiff cannot declare until the other either appears or is outlawed.

Of declaring against two, when one only has appeared.

But he cannot be outlawed unless the proceedings were by special original: so that it is sometimes useful to sue by original, when it is suspected that either of the defendants will not appear, or cannot be found.

In such case, therefore, plaintiff should apply to a judge for an order for time to declare against the defendant, (already in court,) until the other appears, or is arrested, and puts in bail, or is outlawed, as the case may be.

For a declaration first delivered to one, and then, when the other appears, to the other, is irregular. *Knight v. Parker and another*, Blac. 759.

Where

Where a *latitat* was against two, returnable in Michaelmas term, and one appearing, plaintiff filed declaration against him, and took out an *alias* returnable in Hilary term, in which *both* defendants were named, and then the other defendant appeared, and plaintiff filed a new declaration against both as of Michaelmas term; the first was held to be void, and the second wrong dated. *Stork v. Herbert and Eytton*, 1 Wil. 242.

But the court refused to stay proceedings, saying, plaintiff might amend as it was but a mistake.

If one defendant has been outlawed and plaintiff declares against the other, it shall not be in the power of the latter, by pleading, to impeach the outlawry. *Symonds v. Parmiter*, Blac. 21.

Different on
common and
bailable process.

On common process, where the action is not bailable, though four be put in a writ, if plaintiff has a separate cause of action against each, he may afterwards declare severally against one or more of them. *Stable v. Ashley*, Pull. C. B. 49.; but not so if the process be bailable.

For if the plaintiff holds two defendants to bail on a joint action, and declares against them severally, the court will not merely discharge the bail, but will set aside the whole proceedings for irregularity. *Moss v. Birch*, 5 D. & E. 722. where other cases are cited. See also *post* (H).

If plaintiff has a joint and separate cause of action against the four, as where the defendants are all bound in an obligation to him jointly and severally, he must declare either against them all jointly or against each severally, and cannot, if two or three appear, declare jointly against them only.

(H)

(H) Declaration varying from Process.

Of declaration
varying from
process.

See ante, Ch. 3.

f. 1 (E) 3, 4, 5.

The chief distinction in cases of declaration varying from process is, whether the action be bailable or not.

If defendant be held to special bail, plaintiff must not declare for a different cause of action, or in a different capacity than mentioned in writ, otherwise bail will be discharged, and court, on motion, will order a common appearance. *Hally v. Tipping*, 3 Wil. 61., as if the *ac etiam* writ was in his own right, and he afterwards declared as executor.—*Ib.*

So if plaintiff sues out a *quare clausum fregit* and declares in trover, *Turing v. Jones*, K. B. Mich. T. 34 G. 3.; or if the writ be with an *ac etiam* in trespass on the case, and declaration be in debt, or writ be in assumpsit and declaration in trover, *exoneretur* will be ordered. *Tetherington v. Golding*, 7 D. & E. 80.

But

But the court will not discharge defendant out of custody on filing common bail, on the ground of a variance between the declaration and the writ in the sum mentioned in the *ac etiam*, the declaration being only for half the sum mentioned in the writ.—*Ib.*

Formerly, indeed, he could not declare in a different county; but now, by R. Hil. 22 Geo. 3., plaintiff may declare in a different county than that named in the writ, without losing his bail.

If the action be by special original, a greater strictness is observable; and in order to prevent incongruity on the record, declaration must strictly pursue the writ. *Turing v. Jones*, 5 D. & E. 402.

But if the action be notailable, and by bill of Middlesex, *latitat*, or *capias*, the process is deemed a mere summons to bring defendant into court, and plaintiff may afterwards declare for any cause of action different from or not expressed in the writ.

So he may declare in any capacity as assignee of the sheriff, executor, administrator, or even *qui tam*, or the like, though process sued out in his own right generally; because this tends to narrow rather than enlarge plaintiff's demand. *Lloyd v. Williams*, 3 Wil. 141.

So if the demand be still the same, though plaintiff be superfluously described as executor or administrator in process, yet he may declare in his own right.—*Ibid.*

But not if the demand be different; for if process be *qui tam*, he cannot declare generally; because there the demand is not only enlarged, but its very nature changed. *Canning v. Davis*, Burr. 2417. Blac. 723. 2 Wil. 392.

So if process be in a *special* character as *assignee* of a bankrupt, plaintiff cannot declare generally in his own right. *Meggs, assignee, v. Ford*, 25 G. 3.

Where plaintiff, by declaring different from his writ, waives his bail, and after verdict brings an action on the judgment, he shall not have bail in such action. *Crutchfield v. Seyward*, 2 Wil. 93.

A variance between the writ and declaration in the *ac etiam* (the one being in case on promises, and the declaration in debt) was held not material, the sum sworn to being under 40*l.* for the stat. 13 Car. 2. stat. 2. c. 2. on which the *ac etiam* is grounded, operates only where the sum is above 40*l.* *Lockwood v. Hill*, 1 H. B. 310.

N. B. This is a distinction little attended to.—See Introduction.

But if plaintiff sue the defendant by a wrong Christian name, and he has appeared by his right name, plaintiff may declare

declare against him by such right name; but it must be a voluntary appearance; for plaintiff cannot file common bail for him by his right name and then declare. *Doo v. Butcher*, 3 D. & E. 611.

How to take
advantage of
variance.

Formerly, if there was any variance between the original writ and the declaration, the defendant might have taken advantage of it by craving oyer of the writ; but the court have now laid down a rule, that the defendant shall not have oyer of the writ for the purpose of setting aside the proceedings. Upon this principle the court will not, for any such variance, set aside the proceedings on motion; they will only, if it be a bailable action, discharge that bail, otherwise they would be permitting the defendant to do that in a shorter mode, which they cannot, by the rules and practice of the court, effect in a more circuitous way. If, therefore, defendant thinks any variance between the writ and declaration fatal, he can only take advantage of it on a writ of error. *Spalding v. Mure*, 6 D. & E. 364.

(I)

(I) Consolidating Declarations and striking out superfluous Counts.

Of consolidating
declarations.

It is a matter of discretion in the court to oblige plaintiff to consolidate declarations.

But where the causes of action may be joined, and no good reason is shewn why they should not, the court will order them to be consolidated; and if the conduct of plaintiff seems oppressive, will even compel him to pay the costs of the application. *Cecil v. Briggess*, 2 D. & E. 639.

Nor is it sufficient to allege, that plaintiff may be ready with his witnesses in one and not in the other cause, since he might apply to put off the trial upon that ground.—*Ibid.*

This however, used to be deemed a good reason; and the courts formerly very rarely obliged plaintiffs to consolidate declarations upon that account. *Minot v. Bridge*, Str. 1178.

It was even refused in ejectments, although ten declarations were delivered on the same demise, for ten houses.—*Ib.* 1149.

Though in C. B. in a similar case they were ordered to be put into one issue. *Grimston v. Grimston*, Cas. Prac. C. B. 119.

So three declarations for the same assault were ordered to be joined. P. R. 151. *Harper v. Woodhouse*.

(I) Sec. I.] CONSOLIDATING DECLARATIONS.

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Two declarations, one against husband and wife, and the other against the wife only, cannot be consolidated. *Swoithin v. Vincent*, 2 Wil. 227.

If the declaration contain any unnecessary counts or superfluous matter of any length, as unnecessary title set out, or the like, court, on motion, will order them to be struck out; and sometimes (if evidently put in to swell the declaration) with costs of the motion.

Of striking out superfluous counts.

It will appear on the face of the declaration whether the counts be unnecessary, if defendant obtains a particular of plaintiff's demand, which he may do in almost every case; and which will shew plaintiff's cause of action, and the proper counts to recover upon.

The usual way is, to move the court for rule to shew cause why the declaration should not be referred to the master, or prothonotary, for him to strike out the unnecessary counts, and (if the case will warrant it) why plaintiff should not pay costs of the application.

But it was refused after time for pleading was obtained. *Wilkins v. Perry*, Cas. Temp. Hard. 129.

(K) Defects in Process how cured, by Declaration or otherwise.

(K)

Though the process were wrong, if declaration be right it will sometimes cure it.

Of defects in process cured,

As if defendant be sued or arrested by a wrong name, and appears or enters into bail-bond by his right name, and plaintiff afterwards declares right, court will not interpose. *Hole v. Finch*, 2 Wil. 393.

by declaration;

Again, if the process be in any respect defective, or there was any irregularity in service thereof, or otherwise on part of plaintiff, if defendant's attorney takes declaration out of the office and pays for it, all preceding irregularity is waived; for the process is only to bring defendant into court, and he cannot have declaration without coming into court. *Caswall v. Martin*, Cas. Temp. Hard. 369. *Whale v. Fuller*, C. B. T. R. 222.

by taking it out of office;

So defects in process will be cured by not applying to the court in time.

by not applying in time.

Application made the day before executing inquiry held too late. *Smith v. Jenks*, P. R. 127.

Certainly too late if after writ of inquiry executed. *Knight v. Parker*, Blac. 759.

But the safest rule is to make the application with all possible diligence; for such objections are at best but little counted.

DEFECTS CURED BY DECLARATION. [Ch. VI. (K)]

countenanced, and if the party has unnecessarily acquiesced under them, the court will be strongly inclined to deny the motion.

(L)

Of the rule to declare.

(L) The Rule to declare.

If plaintiff does not wish to declare within the time allowed (*viz.* before the end of the next term after return of process), he must on the last day of such term get a rule to declare till the first day of the next term, otherwise defendant may sign judgment of *nonpros*: if he still wants further time, he may on the first day of the term, get another rule to declare until the last day of such term, and then another until the first day of the following term, and so on, taking out two in each term, until defendant chooses to stop him; for he may, if he thinks fit, move the court by counsel, *that the last rule may be peremptory*; in which case, plaintiff must declare on or before the day mentioned therein; for the rule when served, is peremptory in the first instance.

How obtained.

This rule is obtained by giving brief to counsel, annexing thereto an office copy of the last rule to declare; the rule is then drawn up by clerk of rules, and copy served on plaintiff's attorney.

Plaintiff must be very careful in declaring on the day mentioned in his rule to declare, or in obtaining a fresh rule for further time, as defendant may immediately on the expiration of the time, sign *nonpros*, without giving plaintiff any rule to declare. *Towers v. Powel*, C. B. T. R. 87.

When plaintiff has obtained these rules to declare, he should serve copy on defendant's attorney, or stick it up in the office if defendant does not appear.

But should he neglect so to do, and afterwards serve them before defendant had taken advantage of the irregularity by signing judgment, it shall be good and cure the defect. *Jans qui tam v. Hutton*, Blac. 290.

By the terms of the rule, it has no effect if defendant is a prisoner; if therefore, he be in custody, and plaintiff is prevented from declaring against him on account of its being a joint cause of action, and the other defendants not having appeared nor having been yet outlawed, he must move the court, or apply to a judge, and such rule will then be granted until the outlawry or appearance of the other defendants. *Tracy v. Granston*, Bar. 396. 2 Blac. 759. Tidd. 223.

(M) Of intitling Declarations and special Memorandums.

(M)

The declaration is always delivered with a memorandum of the term at the top thereof.

Of intitling declarations and special memorandums.

According to the ancient practice, the declaration was actually delivered in the same term in which the writ was returnable; and although in ease of plaintiffs the time has since been enlarged, still the declaration ought to be intitled as of the term when the writ was returnable; for it is to be considered as delivered *nunc pro tunc*. *Smith v. Muller*, 3 D. & E. 626.

But when the cause of action happens to arise in the very term when the declaration is intitled, care should be taken to make the memorandum of a particular day in the term subsequent to the time when cause of action arose; for a general title of the term refers to the first day, and it would therefore appear as if declaration was filed before any cause of action accrued.

If cause of action accrues in the term.

And where there are several defendants who put in bail of different terms, the declaration should be intitled of the term when the last bail was put in. 1 Wil. 242. *Stock v. Herbert and another*.

Where, however, the declaration was intitled generally, and the cause of action appeared in declaration to have accrued on the first day of the term, it was, on special demurrer, held good; because formerly when the practice was to declare *ore tenus*, plaintiff could not declare before the sitting of the court; and it is possible that the cause of action might accrue on that day before the court sat, and the declaration delivered afterwards, and the court will make any intendment against so captious an objection. *Pugh v. Robinson*, 1 D. & E. 116.

But if declaration be intitled generally, and in point of fact it was delivered regularly after the action accrued, plaintiff may, on affidavit and motion, have the title of declaration amended accordingly. *Symonds v. Parminter*, 1 Wil. 78.

When it may be amended.

At *nisi prius* the party may sometimes give evidence of the real time of suing out the writ so as to avoid the relation to the first day of term. *Morris v. Harwood*, Blac. 312. 320. S. C. Burr. 1241.

So the defendant has a right to call upon plaintiff to intitule his declaration agreeable to the true time of delivering it to defendant. *Thomson v. Marshall*, 1 Wil. 304.

When defendant can insist on plaintiff intitling declaration right.

INTITLING DECLARATION. [Ch. VI. (M)]

And this may be done in order to plead in abatement, which must be within four days after declaration; and therefore if it were intitled generally as of the term, and to have relation to the first day thereof, defendant might often be deprived of this privilege. *Wilkes v. Earl of Halifax*, 2 Wil. 257.

So if defendant would wish to plead *plene administravit*, or a tender and means to give in evidence administration of assets, or tender made between the first day of term and the suing out process. *Smith v. Raydon*, 1 Wil. 39. *Winter v. Moreland*, 2 Barn. 125. *Caf. temp. Hard.* 141.

Court sometimes inquires into time.

On motion in arrest of judgment, because cause of action was laid in Easter term, and declaration intitled of the term generally, it was held well enough, provided bail was not filed till after cause of action accrued, and it was referred to secondary to examine when bail was filed. *Tatlow v. Batement*, 2 Lev. 13.

So that on motions in arrest of judgment, and trials at *nisi prius*, court will inquire when declaration was actually delivered; but not so on demurrer.

How to intitle bill against attorney in vacation.

If a bill be filed against an attorney in the vacation, the day of filing it may be inserted in a special memorandum; as,

"Michaelmas term, &c. Be it remembered, that on the 14th day of December 1792, (a day after the cause of action accrued,) A. B. brought into the office of the clerk of the declarations of this court, according to the course and practice of the court, his certain bill against W. B. Gent., one, &c. and filed the same as of Michaelmas term in the 33d year of the reign, &c.; which said bill follows in these words," &c. *Dodsworth v. Bowen*, 5 D. & E. 325.

SECTION II.

Of the Venue.

- (A) Of laying the Venue.
- (B) Of changing the Venue.
- (C) Of bringing back the Venue by Plaintiff, and his altering his own Venue.

Trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate

rate district or principality, it is absolutely necessary that there should be some county specified where the action is brought, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. Cow. 176.

Now this county which is laid in the declaration, in order to shew where the action is to be tried, is called the venue, *vicinetum*, it being the place *quem vicini habitant*, the jury being generally collected from the neighbouring parts of the country.

It is very material, therefore, to know in what counties actions ought to be brought, and in what cases it is in the power of either party to change the venue, in order that the action may be tried in some other county than that laid in the declaration.

(A) Of laying the Venue.

(A)

The grand distinction which prevails in all cases respecting the venue is, whether the action be local or transitory. It is a distinction that exists all over the world; actions transitory follow the person of the defendant; territorial suits must be discussed in the territorial tribunal. Bl. Com. 3. 384.

Distinction as to local and transitory actions.

The question therefore is, What constitutes a local action?

Wherever the cause of action necessarily must have arisen in any particular county, or wherever the parties to the suit become such by mere privity of estate, as it is called, such action is local, and must be brought in that county where the cause of action arose, or where the estate lies upon which such legal privity attached.

A local action, what.

With respect to the first part of this definition, it may be easily understood; and it is obvious, that it must comprehend all actions where the possession of the land is to be recovered, as ejectment and the like; and also where any actual trespass or waste has been committed upon any premises; but the latter part, being a more nice and legal distinction, may require explanation: in one word, it means only such actions where the cause of action does not arise upon any deed or specific contract between the parties, but merely upon that title which the law gives the one to sue, and that responsibility which it annexes to the other in consequence of the connection between them, as landlord and tenant or the like, arising out of the lands or premises in which they are jointly interested, which is termed in law, privity of estate; whilst other actions grounded on deeds or promises, are said to be founded on privity of contract.

Definition further explained.

Thus an action of *debt* upon a lease for rent, &c. by the assignee or devisee of the lessor against the lessee (1 Wil. 165. W. Jon. 33.), or by the lessor (6 Mod. 194.), or his personal representatives (Latch 197.), against the assignee of the lessee, or against the executor of the lessee in the *debt* and *detinet* (2 Lev. 80. 3 Keb. 135.); or in *covenant*, by the grantee of the reversion against the assignee of the lessee (Carth. 182. 3 Mod. 336. 1 Salk. 80. 6 Mod. 194.), is local, and must be brought where the estate lies, because such action is founded only on the privity of *estate*.

Actions by administrator.
Quere?

So perhaps in an action by an administrator, the venue should not be out of the diocese of the bishop who granted him administration. *Mellor v. Barber*, 3 D. & E. 387. *Sed Q.?*

Transitory actions, what.

Such then being the criterions of a local action, it follows that a *transitory* action must be such as may have arisen in any county.

Thus in all actions of debt or covenant, (except as above-mentioned,) assumpsit, assault, slander, detinue, deceit, trover, and the like, where the injury might have been sustained in one county as well as another, the venue may be laid in any county; because it will be presumed, unless the contrary is shewn, that the cause of action did arise in that county in which the venue is laid; otherwise, upon proper application to the court, as will be presently shewn, it may be changed.

On bail-bond.
False return.

There are several actions which at first view might appear local, but on further consideration are clearly transitory; such as upon assignment of a bail-bond, or the like; or against a sheriff for a false return, or an escape. It does not necessarily follow, that the cause of action must arise in the county where he is sheriff; for a sheriff may assign a bail-bond, or may make his return to a writ in any county, and an escape in one county is an escape every where. *Str. 727. Griffiths v. Walker*, 1 Wil. 336. S. C. Say. 54.

Escape.

Where action arises in two counties, plaintiff may elect.
Instances.

Sometimes a cause of action arises partly in one county and partly in another; in which case, it is at the election of the plaintiff to lay the venue in either; as in cases of carriers, or of hiring a horse in one county to ride to another, 1 Lev. 286.; or in actions on the case for not repairing a wall or the like, whereby plaintiff's land was overflowed, if the wall be in one county and plaintiff's land in another, 1 Lev. 114.; or for maliciously suing an execution in Middlesex, whereby plaintiff was arrested in Dorsetshire, Cro. Eliz. 574.; or if two conspire in one county to indict another, and make the execution of the conspiracy in another,

7 Co. 1. *Bulwer's case*; and the like. Mayor, &c. of *Berwick v. Ewart*, Blac. 1069.

So if there be matter of law or record, and matter in pais in different counties, plaintiff has his election. *Griffiths v. Walker*, 1 Wil. 336. *Scott v. Brest*, 2 D. & E. 241.

And where the cause of action arises in two counties, the venue shall not be laid in a third. *Shirley v. Collis*, Blac. 940.

The same distinction also prevails where the cause of action arises beyond the seas. Where action arises abroad

All actions upon contracts, upon deeds, upon personal injuries, as assaults and the like, for injuries to personal property, as taking a ship and the like, or any other transitory action, though arising out of the realm, may be brought in this country. If transitory brought here.

Even an action of trover for timber cut in Ireland. Str. 614. *Dutch W. I. Comp. v. Hen. Van. Moses*.

There have been instances indeed of local actions being brought here, as for destroying fishing-huts upon the Labrador coast, *Admiral Palliser's case*, Cow. 181., and for pulling down the houses of some sutlers, *Captain Gambier's case*, Ibid. 180. But they seem to have been countenanced rather *ex necessitate rei*, lest there should be a failure of justice, and the injured party not able to obtain any other redress, than to have been supported upon the strict principle of law. *Moslyn v. Fabrigas*, Cow. 181. In some instances carried to local actions.

They should be looked upon, therefore, only as exceptions to the general rule.

If a transitory action arising abroad be brought here, the venue may be laid in any county; but if it should be such an action as renders it necessary to state where it arose, as on a deed, or bill of exchange, or taking a ship, or the like, the real place may be alleged; but it should be followed with a *videlicet* and a venue corresponding with that laid in the declaration; as for instance, if on a bond, it should be stated to have been made at Fort St. George in the East Indies, to wit, at London in the ward of Cheap; or if for taking a ship, that it was taken on the high seas, viz. in Cheapside, or any other place, as a venue merely *pro forma*. Ibid. 178, 179. How venue laid.

For if the bond be stated to have been made at London, and on oyer it appears dated at Fort St. George, or the like, it would be bad on demurrer. Ibid. 178.

If the action be really local, and the venue be not of the proper county, should it appear on the face of the declaration, it would be demurrable to; or if it is proved on the trial, plaintiff will be nonsuited. of venue being wrong in local actions.

How demurrable to.

But it should be a special demurrer, as a bad venue, or the want of one is cured by the statute of jeofails. *Mellor v. Barber*, 3 D. & E. 387.

If right in body of declaration well.

Where a proper venue is laid in the body of the declaration, the venue in the margin shall not vitiate it: but if there be no venue in the body, then reference must be had to the margin; the county in the margin will help, but not hurt. *Ibid.* *Sutton v. Fenn*, 3 Wil. 340.

How venue;

Venue in margin, London; in declaration, Oxfordshire; cause tried in Oxfordshire; held well. *Sheers v. Bartlett*, Bar. 484.

if by original.

Where the proceedings are by original, the venue must be laid in the county where the original issued, or the plaintiff will lose his bail; but not so if it be only a common bailable writ with an *ac etiam*.

Venue altered by act of parliament.

By different acts of parliament many actions of a transitory nature must be brought in the county where they arose, otherwise the defendant will be entitled to a verdict.

In penal actions.

Such is the statute 21 Jac. 1. c. 4. which enacts, That all suits on penal statutes shall be laid in their proper county.

This statute extends to informations as well as actions. 4 Inst. 172. 1 Vent. 8. 3 Inst. 193. Cro. Car. 112. Cro. El. 737. 1 Sal. 373. Cont. 4 Mod. 159.

Construction, 21 Jac. 1. c. 4.

But it does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby; 1 Salk. 372. by ten judges; though C. J. Holt said, that he thought where any subsequent act gives any popular action, it should be laid in the proper county, within the equity of 21 Jac. 1.

In a *qui tam* action for usury, the venue is well laid where the offence was completed. *Scott v. Brest*, 2 D. & E. 238.

In actions against justices, &c.

Such also is the statute of 21 Jac. 1. c. 12. sec. 5th whereby all actions brought against any justice, mayor, or bailiff of any city, town corporate, headborough, portrieve, constable, tithing-man, collector of subsidy, fifteenths, churchwardens, or other persons called sworn men, executing the office of churchwarden, or overseer of the poor, and their deputies, or any of them, or other persons acting in their aid, or by their command, for any thing done in their official capacity, must be brought in the county where the fact was committed.

Construction thereof.

If an action be against a justice of peace, &c. for any thing done by colour or under pretence of his office, though not strictly within the duty of his office, it comes within the act. *Vaughan* 114. *Daniel v. Wood*, 5 D. & E. 1.

But if a constable, under a warrant, take a man and carry him before a magistrate, who discharges him, and soon after,

on

on a dispute happening, the constable beats him; this is not within the statute, and the constable need not be sued within the county. *Anon.* Str. 446.

So for protection of revenue officers, the like rule is enforced by 20 G. 3. c. 70. s. 34. in all actions brought against *excise officers*; and by 24 G. 3. sess. 2. c. 47. s. 35. in all actions brought against *custom-house officers*, or any acting in their aid, for any thing done by virtue of their office.

Against revenue officers.

And this, if they act *bonâ fide* as officers, though illegally. *Daniel v. Wood*, 5 D. & E. 1.

And as a further protection, by 9 G. 2. c. 35. s. 26. whenever revenue officers prosecute for assaults committed upon them, the indictment may be tried in any county. But this only extends to assaults made upon them in the execution of their office. *The King v. Cartwright*, 4 D. & E. 490.

By revenue officers.

This is also a common provision in other acts of parliament of a public nature, as turnpike acts, or the like.

As provided by other statutes.

But where an act confers certain privileges on officers who may be sued for things done in pursuance of that act, and a subsequent act imposes new obligations on the old officers, the privileges of the former statute do not attach on them in respect of things done under the latter: therefore toll gate keepers sued for acts done under 25 G. 3. c. 51. need not be sued in the county where the fact was committed, as they must be under the 13 G. 3. c. 78. s. 81. *Bazing v. Skelton*, 5 D. & E. 16.

General rule.

(B) Of changing the Venue.

(B)

Although the venue in transitory actions may be laid in any county, yet upon application to the court, and proper cause shewn, it will very frequently be ordered to be changed.

In what actions it may be changed.

It is said, indeed, by Lord Mansfield, that not in transitory only, but even in local actions, the court will order the venue to be changed where there is a *dignus vindice nodus*, but not otherwise by any means. Loft. 50. 3 Blac. Com. 384.

The general grounds upon which the court will order the venue to be changed are,

Upon what grounds.

1st, When the cause of action arises in the county to which defendant moves to change the venue.

1st, Cause of action arising elsewhere.

But then it must *wholly* arise there, and not elsewhere out of that county, nor in anywise in the county in which the venue is already laid.

And there must be an affidavit to that effect, strictly stating, that the cause of action arose in B, and not in A. or

elsewhere

CHANGING THE VENUE. [CH. VI. (B)]

elsewhere out of B.; for if it only says, that the cause of action arose in B. and not elsewhere out of B. without particularising that it did not arise in A. it will be bad. *Allen v. Griffiths*, 3 D. & E. 495. Say. 77. Wil. 178.

Which must be positive, and not merely to defendant's knowledge and belief. *Belsbaw v. Porter*, Bar. 478.

This then is the criterion; and perhaps it cannot be better illustrated than by the different modern determinations as to changing the venue in actions in libels.

Actions for a libel in a country newspaper; motion to change the venue into the county where it was printed; refused, because it was circulated elsewhere. *Pinkney v. Collins*, 1 D. & E. 571.

So where a libellous letter was written in Berkshire, but directed into Surry, venue laid in London, court refused to change it into Berkshire. *Cliffold v. Cliffold*, Ibid. 647.

Because defendant could not swear that the cause of action wholly arose in the county into which he moved venue to be changed, and not elsewhere.

But where a libel was both written and published in one county, as a letter written at one place and sent to another, both in the same county, the court will change the venue into that county, because the whole publication was confined within it. *Freeman v. Norris*, 3 D. & E. 306.

So where a libel is written in one county and not opened in another, though it passes through it, as a letter written in Yorkshire, and sent by the post into Germany, where it was opened, court ordered venue to be changed from London to Yorkshire, because defendant was warranted in his affirmation that the cause of action arose in Yorkshire, and not elsewhere within the kingdom. *Metcalf v. Markham*, 3 D. & E. 652.

Upon the same principle in an action for infringing a patent, the plaintiff cannot change the venue from Middlesex to any other county, where it is manifest that the substratum of the action, viz. the patent, is at *Westminster*. *Cameron v. Gray*, 6 D. & E. 363.

Whenever, therefore, the fact cannot be positively sworn to in the terms above-mentioned, it is a matter of course for the court to change the venue; but not otherwise.

An affidavit of one defendant will do. *Rex v. Read*, Bar. 482.

The second ground for the court changing the venue is,

When it appears upon the circumstances laid before them, that there is a probable ground to apprehend, that a fair, impartial, or at least satisfactory trial cannot be had.

And

ad, Trial partial, or not satisfactory.

And this may be occasioned by local prejudices, or interest, or the like. *Mayor of Poole v. Bennett*, Str. 874. *Mylock v. Saladine*, Burr. 1564. *Petyt v. Berkley*, Cow. 510.

But it is not a motion of course; the court will expect proper affidavits to support it. *Mayor of Bristol v. Proctor*, Wil. 298. *Rex v. Harris*, Burr. 1333.

Upon this ground, when strong reasons are suggested, the venue is changed even in local actions, as ejectment; but the usual way is, to take a rule to try the cause in the next county, and not to change the venue. 1 Wil. 77. *Mayor of Bristol's case*.

The above are the two usual grounds of application to change the venue; but there are many actions in which the common affidavit cannot be made, because the cause of action is not wholly and necessarily confined to a single county; and therefore the venue cannot be changed unless special cause is shewn.

3d, Special grounds, as witnesses residing elsewhere.

Such are actions upon bonds or other specialties, promissory notes, or bills of exchange, because they are *bona notabilia* any where, *Kirk v. Broad*, Say. 7. *Downes v. Brian*, Blac. 993. 1 Wil. 41. Cont. 1 Wil. 173.; actions for *scandalum magnatum*, 2 Str. 807. *Ld. Ray*. 1418. *Sal*. 668.; escapes, *Sal*. 670.; false returns, *Sal*. 669.; against carriers, *Sal*. 670.; and the like transitory actions arising in more counties than one: yet it may be extremely inconvenient to the defendant to try the cause in the county where the venue is laid. There is, therefore, a third ground of application, namely, The existence of certain special reasons why the venue should be changed elsewhere, rendering the particular case an exception to the general rule.

Thus where the action was on bond, and pleas *non est factum solvit post diem* and usury, venue was changed from London into Lincolnshire, on the ground that defendant's defence arose there, and both plaintiff and defendant's witnesses lived there. *Foster v. Taylor*, 1 D. & E. 782. n.

But if only defendant's witnesses lived there and not plaintiff's, it would not be sufficient; because it might be equally convenient to plaintiff to try the action where he had laid the venue. *Fleche v. Godfrey*, E. 23 G. 3. B. R. cited in 1 D. & E. 782.

This, however, depends upon circumstances; for in an action on a promissory note, court permitted defendant to change the venue from London to Ludlow, where note was made on a special affidavit of the nature of his defence, the number of his witnesses, and that they resided at Ludlow; although,

Into what coun-
ties it can be
changed.
Not into Wales.

though, on a general affidavit of all his witnesses living there, it was at first refused. *Evans v. Weaver*, Pull. C. B. 20.

There are certain counties into which the venue cannot be changed.

It seems to be the better opinion, that it cannot be changed into any county in Wales.

I say the better opinion; because, although the question has at various times been brought on, it has never been determined; but in all the cases, it has either been granted, because no cause has been shewn, or it has been denied, upon the plaintiff's undertaking to give material evidence in the county where the venue was laid, or the court have taken time to consider the point, and have never given their judgment.

Of the first are the cases of *Tindal v. Gwynne*, Str. 1270. *Waddington v. Thelwell*, Burr. 2450. *Freeman v. Gwynn*, Blac. 962.; and *Jones v. Rees*, Hil. 24 G. 3. Of the second, *Pritchard v. Pugh*, Dougl. 262. Of the last, *Price v. Griffith*, Wil. 221.

But in one case it is said to have been absolutely refused. *Watkins v. Hibert*, Say. 48.

Why.

The difficulties seems to be, first, if changed into a Welch county, to whom must the writ of inquiry be directed in case of judgment by default; per J. Buller, in *Pritchard and Pugh*, Dougl. 263. And if it be changed into the next adjacent English county, how can the affidavit be made, that the cause of action arose there. Burr. 2451.

N. B. I understand, that in cases of judgment by default, in actions where the venue is laid in Wales, it is the practice to direct the writ of inquiry to the Welch sheriff, and have it executed there, and not in the next English county, as where an issue is to be tried.

How if by con-
sent.

Where the venue is changed without opposition, the rule is, to change the venue into a Welch county; yet the cause is to be tried in the next adjoining English county, Blac. 962.: but the court will not change it to the next adjoining English county. *Moor v. Fernhaugh*, 1 Wil. 138.

Quære?

Q. Why then cannot the venue be changed into Wales; and if judgment by default, writ of inquiry directed to Welch sheriff; if a trial, tried in the next English county?

Hardship of
present practice.

At present, however, any plaintiff, for any trifling cause of action in Wales, may lay the venue in London, and compel defendant to bring all his witnesses there, which might prove a serious grievance.

Not into coun-
ties palatine.

Venue not to be changed into counties palatine, Str. 807. *Richardson v. Walker*, Bar. 488.; but it may into Chester, because

because the court can send down record by *mittimus*. Ray. 1418. 1 Wil. 222. *Price v. Griffiths*.

Though in a late case, *Marsden v. Bell*, Hil. 28 Geo. 3. *Quære 2* on motion to change venue from Middlesex to Lancaster, it was granted; but court directed, that on these motions to counties palatine, the words "undertaking not to assign error for want of an original," be added to the common rule.

Venue not to be changed into a third county without consent. Str. 1216. *Southouse v. Boak*.

Court will not, in general, change venue into any county, whereby trial may be delayed. *Not into county to delay a trial.*

As into either of the three northern counties, preceding the spring circuit. 1 Wil. 138. *Moore v. Fernbaugh*.

Nor into Bristol, there being no Lent assizes. Str. 1180. *Hewarth v. Willett*.

Nor into Hull, Canterbury, &c. because it is not known when an assize may be held there.

But in Easter and Trinity term, this objection does not hold; and even at other times it is solely in the discretion of the court. *Rickaby v. Wilson*, Bar. 490.

Venue cannot be changed from a county at large into a city and county. *Lewis v. Askeham*, Bar. 489, 490.

But it may from a county at large into the city of London. *Lutwich v. Eames*, Bar. 481.

If cause of action arise in Berwick, venue should be in Northumberland. *Mayor of Berwick v. Ewart*, Blac. 1036. Burr. 834. 859.

Defendant cannot move to change the venue the last day of term, there being no day left to plaintiff to shew cause. *When a motion to change venue to be made.* *Wood v. Winch*, Bar. 480. *Thomeur v. Rand*, Ibid. 486.

Unless declaration was delivered so late that defendant could not move sooner. *Hayward v. Wells*, Bar. 489.

Defendant cannot move to change the venue in any action until he has appeared. *R. East*. 24 Car. 2.

Nor after plea pleaded. Str. 858. *Dickinson v. Fisher*.

But the defendants having put in their plea after a rule for shewing cause why the venue should not be changed, and before it was made absolute, the court held, that the putting in the plea by inadvertency was no waiver of the rule, and gave defendants leave to withdraw it on payment of cost, and made rule to change venue absolute. *Herbert v. Flower*, Bar. 492.

Formerly, it was doubted whether motion could be made after defendant had obtained time to plead, and in many cases held not; but by rule 16 Geo. 2. "any defendant may move to change venue at any time before plea pleaded, in
" all

"all such actions where the venue may be changed by the course of the court, notwithstanding such defendant may have applied for and obtained further time to plead before such motion made."

But not if the order obtained be to plead issuably, rejoin *gratis*, and take short notice of trial for the first sitting in London or Middlesex; because there a trial would be lost, *Petyt v. Berkley*, Cow. 511. *K. B. Burgefs v. Carter*, Ibid. C. B. Cont. *Wightman v. Thompson*, 1 Wil. 245.

So motion may be made after an order for time to perfect bail. *Newly v. Burton*, Bar. 483.

Or after an order for an imparlance. *Blackstock v. Payne*, Bar. 487.

If a declaration be delivered so early in term that the defendant has eight days in that term, he cannot move to change the venue the next term. *Asplin v. Gray*, Str. 211.

But if he has less than eight, and has not pleaded, he may. R. Mich. 1654.

If proceedings are by original, court will not change venue without defendant undertakes not to bring error for want of an original; which would otherwise be fatal.

How to be made.

No notice of motion is necessary to be given to the adverse party or his attorney.

In term time.

It is moved by counsel or serjeant, as case may be; in B. R. it is absolute in first instance; but in C. B. there must be another motion to make it absolute. When rule made out, serve it on plaintiff's attorney, who will call and alter declaration with you.

Form of affidavit.

The usual affidavit to be sworn by defendant, or one of them (if many), is as follows:

E. B. of, &c. the above defendant, maketh oath, and saith, That the plaintiff's cause of action (if any) arose in the county of A. and not in the county of B. as laid in the declaration, nor elsewhere out of the county of A.

In vacation.

If in vacation, a judge's order is obtained for that purpose, on producing the usual affidavit and counsel or serjeant's hand to a brief, part of the order being, "that plaintiff be at liberty to change the same back again on undertaking to give evidence in the former county."

Of laying and changing the venue by privileged persons.

An attorney, when plaintiff, may lay the venue in Middlesex, because his attendance is supposed to be necessary at the courts of Westminster, and he may retain it there, *Pope v. Redfearn*, Burr. 2027. *Pilkington v. Hankin*, Say. 153.

Attornies.

And this though he be resident in the country, *Pye v. Leigh*, Blac. 1065. 2 Show. 242.; and although plaintiff and defendant and all the witnesses live in the country.

The

The same privilege extends to serjeants, barristers, masters in chancery, clerks of assize, judges' clerks, and other officers of the court. 2 Show. 176. 242. Mod. 64. Str. 822. 1 Wil. 159. *Knight v. Barneby*, Ray. 1253. Sal. 670. *Girdler v. Watheres*, Bar. 484.

How far it extends to them as plaintiffs.

But this privilege does not extend to them if they sue in *auter droit* as heirs, executors, or administrators. *Pope v. Redfearn*, marginal note, Burr. 2027.

Or if they declare as common persons; as if plaintiff does not sue by attachment, but by *capias*, *Welland v. Frument*, Bar. 479.; or by original, *Girdler v. Watheres*, Bar. 484.; or if he declares by attorney instead of in person. *Dent v. Lambert*, Bar. 479.

But it is now settled, that this privilege only extends to an attorney where he is plaintiff, and that as defendant, he has no privilege to change the venue into Middlesex. *Teardly v. Roe*, 3 D. & E. 573.

But not as defendants.

Because there is no necessity for an attorney to go down into the country to attend a cause where he is defendant. *Pope v. Redfearn*, Burr. 2028.

Though formerly it used to be held otherwise. See a variety of cases in *Pope* and *Redfearn*, when the present practice was first settled.

(C) Of bringing back the Venue by Plaintiff, and altering his own Venue.

(C)

Although the defendant upon the common affidavit may change the venue, yet the plaintiff is not concluded thereby, but may move the court why the former rule for changing the venue should not be discharged, on the ground that it had been improperly removed; as where the fact sworn to by defendant could not possibly be true of the *whole* cause of action arising elsewhere.

In an action on a policy of insurance on the life of a person who had lately died in *Scotland*, venue changed on usual affidavit from *Middlesex* to *London*, but ordered back for the above reason, as the whole cause of action could not arise in *London*, the party having died in *Scotland*. *Cailland v. Champion*, 7 D. & E. 205.

Again, the court will suffer the plaintiff to retain his original venue, upon his undertaking to give material evidence arising in that county.

Formerly, indeed, it was required of plaintiff to give no other evidence except what arose there. 1 Keb. 189. 1 Sid.

Of giving material evidence in county.

442. But it has since been held sufficient to give *some material evidence* only.

What amounts to that.

If, however, plaintiff upon the trial does not give some evidence of the cause of action, or part thereof, arising in the county, he must be nonsuited. *Santler v. Heard*, Blac. 1034.

Nor is it enough to shew that the witnesses to prove the contract resided there. *Ibid.*

Rule to pay money into court.

But it has been held a sufficient compliance with the undertaking, to prove a rule of court in Middlesex for defendant to pay money into court, though that rule was obtained after the undertaking of plaintiff to give material evidence. *Watkins v. Towers*, 2 D. & E. 275.

Because the payment of money into court was an admission of something due to plaintiff on the contract stated in the deed, and superseded the necessity of that proof which the plaintiff would otherwise have given; and the contract as stated was on a deed in Middlesex.

Action arising abroad.

So it is sufficient to prove, that the cause of action arose abroad; because then the fiction of law prevails with respect to the venue in such cases. *Gerard v. De Robeck*, 1 H. Blac. 280.

But this undertaking is absolutely necessary; for it is not merely sufficient to falsify defendant's affidavit by plaintiff's swearing that the cause of action arose where venue laid. *French v. Coppinger*, 1 H. Blac. 216.

What sufficient cause to bring back venue.

Although the venue has been changed into the county where cause of action arose, yet if it appears on part of plaintiff, that such county is an improper county to try it in, by reason of partiality or interest of the jury, or otherwise, the original venue shall be retained. *Slaughter v. Bradock*, Burr. 2447. *Petyt v. Berkley*, Cow. 510. Sal. 670.

What not.

But not sufficient, because witnesses live at a distance, and will not come so far. *Fogoe v. Gale*, 1 Wil. 162.

When plaintiff must move to bring it back.

Plaintiff must move to discharge defendant's rule for changing the venue before replication. *Dickinson v. Fisher*, Str. 858.

It will be too late after he has altered the issue and delivered it to defendant; motion to bring back the venue was, in such case, discharged, though without costs. — *v. Boddington*, Mich. 20 G. 3. B. R. 1 Crom. 114.

How he can do it, by moving to amend.

Although the plaintiff may not regularly move to change the venue, he may in effect do it by moving to amend, which was done in this case by striking out Dorsetshire and inserting Middlesex. *Strond v. Tilley*, Str. 1162.

So in the case of *Rivett* and another *v. Cholmondeley*, though defendant had changed venue on the usual affidavit. Str. 1202.

It

It was for this reason that the court suffered plaintiff to bring back the venue after it had been changed by defendant, and the cause had gone down to trial, and plaintiff had been nonsuited, and the nonsuit afterwards set aside and a new trial directed; and the cause had been down a second time, and for defect of jurors, was made a *remanet*, because, *per* Lord Mansfield, the plaintiff may at any time move to amend his declaration and alter the venue; and we think it an idle circuitry to put him to this; and if we permit him now to bring the venue back, he does it at his peril; because if he does not give material evidence in London, he must be nonsuited; and if it should appear to be a local action by statute, he must be nonsuited at the opening. *Bruckshaw v. Hopkins*, Cow. 409.

But the case of ——— v. *Boddington* above cited, is later in point of time.

In an action on a remedial law, when the time had expired for bringing a new action, plaintiff allowed to alter the venue, it having been laid wrong by mistake, though after plea pleaded and issue joined; but court would not have done it on a penal statute, *Cook v. Shore*, Bar. 12.; or in a common case, *Bird*, executor, v. *Foster*, Bar. 19.

When alteration
of venue al-
lowed.

CHAPTER VII.

Of the Proceedings from Declaration to Issue.

- SEC. 1. *Of claiming Conusance.*
- SEC. 2. *Of demanding Oyer.*
- SEC. 3. *Of Imparlance.*
- SEC. 4. *Of pleading in Abatement.*
- SEC. 5. *Of paying Money into Court.*
- SEC. 6. *Of pleading in Bar.*
- SEC. 7. *Of the Rule to plead.*
- SEC. 8. *Of demanding a Plea.*
- SEC. 9. *Of searching for Plea, and signing Judgment for Want thereof.*
- SEC. 10. *Of obtaining Time to plead.*
- SEC. 11. *Of moving to abide by Plea.*
- SEC. 12. *Of Replying, Rejoining, &c.*
- SEC. 13. *Of pleading a Tender.*
- SEC. 14. *Of Plea and Notice of Set-off.*

SECTION I.

Of claiming Conusance.

- (A) Of the Nature of inferior Jurisdictions, and what Courts can demand Cognizance.
- (B) In what Cases it will be granted or refused.
- (C) Of the Time and Manner of claiming it.

WHEN any person or body corporate hath the franchise not only of holding pleas within a particular limited jurisdiction, but also of the cognizance of pleas, if any suit belonging

belonging to such jurisdiction be brought in the courts at *Westminster*, they may be prevented from proceeding therein either by the lord of the franchise interposing by claiming cognizance of the suit, or by the defendant himself pleading to the jurisdiction of the court. 3 Bl. Com. 258.

If the grant of the transaction be *without* any words exclusive of other courts, then the lord must claim the conusance; but if it be *with* such exclusive words, then the defendant is entitled to plead to the jurisdiction. *Ibid.*

For the better understanding of this matter, it will be necessary to state the differences between inferior jurisdictions, which are of three sorts.

Three sorts of inferior jurisdictions.

The first is *tenere placita*, or a privilege of holding plea, which is the lowest, and is a concurrent jurisdiction; in which case the plaintiff may proceed in the inferior court if he will; but that does not deprive the subject of having the cause tried in a superior court, if he chuses to remove it by *certiorari*, *habeas corpus*, &c., and that for good reason; for if it were otherwise, a man who comes by chance into an inferior jurisdiction, might be arrested there, and detained in gaol a long time for want of bail.

1st, Merely a privilege of holding pleas.

The second sort is *conusance of pleas*; which is by grant to some lord of the franchise, and he alone can take advantage of the privilege, neither the plaintiff nor defendant; for the defendant cannot plead it to the jurisdiction of the superior court, but the lord by his bailiff or attorney, must come in and claim it; and though the lord ought to have it, the superior court is not ousted, for the plea remains under the controul of the superior court; and day is given upon the roll there to the parties to be in the inferior court at a day certain; and the parties are commanded there, and the tenor of the record is sent, for the inferior court to proceed, and if justice is done there, it is well, but the record remains above; but if justice is not done there, as if the court will not proceed upon the day prefixed, or if the judge misbehaves himself, &c. the plaintiff may have a re-summons. And it is the benefit of the lords only which is considered in this matter. But these jurisdictions were hardships to the subject, and allowed by 27 H. 8. c. 24. rather for their antiquity than for any other reason; and they were detrimental to the prerogative of the crown, and therefore *certiorari's* were always allowed to prevent the grievances of these inferior jurisdictions.

2d, Conusance of pleas.

The third sort are exempt jurisdictions, as where the king grants to a city, &c. that the inhabitants shall be sued within the city, and not elsewhere; such a grant may be pleaded to the jurisdiction of the superior court, if there is a court there

3d, Exempt jurisdictions.

which can hold plea of the cause. No one but the defendant himself can take advantage of this; and if he is sued there, he may waive his privilege, and remove the cause by *certiorari*, *habeas corpus*, &c. *Ld. Raym.* 836.

(B) (B) In what Cases it will be granted or refused.

Great strictness
in mode of
claiming conu-
sance.

As the demand of conusance is made against the general jurisdiction of the king's superior courts, and against the administration of justice therein; the claim is always nicely looked into, and the superior courts tie them down to the strictest practice and form imaginable in demanding it.

It must be en-
tered on record.

Claim of conusance must be entered upon the record, and every thing stated with great exactness and precision, that is to take away the jurisdiction, as it may be demurred to, or the facts therein alledged controverted by pleading. *Leasingby v. Smith*, 2 *Wil.* 409.

Allowed to uni-
versities.

In transitory actions between the scholars of the universities of Oxford and Cambridge, the University shall have conusance, because by their charters, confirmed by act of parliament, they shall have jurisdiction over the persons of their scholars.

How.

The University of Cambridge claimed conusance, and produced the certificate of the chancellor that the parties were of the University; and upon a rule to shew cause it was objected, that the claim ought to be entered upon a roll, and an affidavit to verify the certificate should be produced; and of that opinion was the court, and discharged the rule, and then it was too late to make a new claim. *Paternoster v. Graham*, *Str.* 810. *Vide* the case of *Foster* against *Hexham*, 1 *Ld. Raym.* 427.

When.

The University is not entitled to conusance unless the defendant be resident in the University, and there must be an affidavit of it.

Conusance may be demanded though the defendant be in the custody of the marshal. *Ld. Raym.* 135.

To what ac-
tions.

The charter of 14 H. 8. respecting the privileges of the University of Oxford, extends to actions arising in any part of England; but this does not intend that scholars, as plaintiffs, shall have the privilege of suing in the University in causes of action arising in any part of England; but when they are defendants this privilege extends all over England.

Residence ne-
cessary;

But then it is absolutely necessary that such scholars or members being defendants, shall be *resident* in the university, and the privilege extends from the highest members to the lowest servants there *residing*; but the superior courts construe this privilege very strictly, therefore it ought to be made

to appear clearly to the court that the defendant is a scholar residing.

It should be certified by the chancellor, and appear upon record before the privilege can be allowed.

which must be certified.

The claim of conusance is tantamount to a plea in abatement, the truth whereof must be verified by affidavit; this seems to be the reason why affidavits were first introduced in these motions for allowing conusance.

Affidavit also necessary.

An affidavit seems necessary as well as the chancellor's certificate of residence. *Hayes v. Long*, 2 Wil. 312.

It is a general rule, that wherever the defendant can plead to the jurisdiction of the courts at Westminster, there the franchise may demand conusance, but not *vice versa*. Carth. 11. 354.

Conusance will not be allowed if it occasions a failure of justice, 2 Vent. 363. 3 Lev. 149.; or if the action be brought against the person himself who claims the franchise, unless he hath also the power in such case of making another judge. Hob. 87.

When not allowed.

Conusance cannot be claimed of any action that was not in *esse* at the time of the grant. 14 H. 4. 20.

Conusance won't be allowed where trespass, &c. is brought against a foreigner who has nothing within the franchise, for they cannot oblige a stranger who has nothing to answer. 22 Aff. 83.

(C) Of the Time and Manner of claiming it.

(C)

Conusance must be claimed in the first instance, or at the first day the party has. Burr. Rep. 2824.

Must be claimed in first instance.

Conusance of pleas refused to the university of Oxford, because neither claimed in due form nor in due time. 2 Wil. 409.

Claim of conusance must be made before an imparlance, and must be made the first day the party has in court, even upon the return day of the writ, if the cause of action appears therein; if not, then upon the first day given upon the declaration. *Leasingby v. Smith*, 2 Wil. 413.

Conusance must be demanded before full defence is made, Rast. Ent. 128. or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay is a laches in the lord of the franchise. 3 Bl. Com. 298.

Before imparlance;

In C. B. claim of conusance by the university of Oxford was disallowed, as coming too late after plea pleaded and replication tendering an issue; rule to shew cause why the claim should not be allowed, was discharged. Bar. 346. *Wells v. Treborn*.

or plea pleaded.

Particularities
required.

In assult, the latitat was of Michaelmas term, but the defendant never appeared; and this term the plaintiff entered an appearance for the defendant and filed common bail, and left a declaration in the office; and now, before plea pleaded, imparlance prayed, Blackstone exhibited a claim of conusance by the Earl of Litchfield chancellor of the university of Oxford, stating the charters of the university, confirmed by stat. 13 Eliz. and alleged, that the defendant was a privileged person, as being a matriculated person, and fellow of Brazen Nose College, where he was a master of arts and in holy orders; this claim was under seal of the chancellor's office, and was (previous to the present motion) entered upon record, together with a letter of attorney from the chancellor, empowering one Elderton, an attorney of this court, to appear in his name and demand the conusance. There were also affidavits from the defendant himself and another person, which proved him to be, at the time of the writ sued, and at the time of making the claim, a matriculated person; on reading all which, and also the charter of king Henry the Eighth under the great seal, and an exemplification of the statute 13 Eliz. (which, though printed in the statute-books, is only a private act,) the court granted a rule to shew cause why the cognizance should not be allowed, and in the mean time all proceedings to stay. *Blac. 454. Kendrick v. Kynaston.*

None is bound to claim conusance until he is intended by law to have some legal notice of his franchise being entrenched upon.

What a bar to
such claim.

In order to bar a claim of conusance, some laches or default in him should be shewn, and that he might have claimed it sooner after such notice as above. *Rex v. Agar, Burr. 2820.*

The authority of an attorney continues after a claim of conusance, but not after a writ of error brought. *Ld. Raym. 896.*

The principal cases on this subject are. *Ld. Raym. 427. 475. 836. 1338. Burr. 2824. 1 Wil. 310. 2 Wil. 406. 10 Mod. 126. Hard. 505.*

SECTION II.

Of Demanding Oyer.

- (A) Of what, and in what Cases Oyer may be demanded.
- (B) Of the Time and Manner of demanding and giving Oyer, and the Consequence of refusing it, &c.
- (C) How the Deed must be set out on Oyer, and the Use of craving it.

(A) Of what, and in what Cases Oyer may be demanded.

(A)

Formerly the defendant was not bound to plead till oyer and a copy of the original writ had been given him if demanded; but it is now the settled practice of both courts not to grant oyer of the original, and if defendant craves oyer thereof, plaintiff may proceed without taking any notice, and sign judgment for want of a plea. *Boats v. Edward*, Do. 227. *Hole v. Finch*, 2 Wil. 394. R. T. 19 G. 3.

No oyer of original writ.

So that all the delay which was formerly occasioned by such oyer, and by taking advantage of any variances between the writ and declaration, is at an end; and the only way in which defendant can now avail himself of any such objection, provided he thinks it fatal, is by writ of error. *Spalding v. Mure*, 6 D. & E. 364.

How defendant can avail himself of a variance.

Still, however, in all cases where the ends of substantial justice require it, oyer must be granted.

Whenever, therefore, either the plaintiff or defendant grounds his action or defence upon any deed, he must in the pleadings make a profert of that deed (or shew some sufficient reason for not doing so), in order that the other party may crave oyer, and be able to get at the knowledge of its contents.

Whenever deed pleaded, a profert must be made, or reasons shewn.

If a profert be made, oyer cannot be dispensed with, because the party is supposed to have brought the deed into court, and it is absurd to say, that it is out of his power to give a copy of it.

If a profert, oyer not to be dispensed with.

For this reason the party pleading a deed was often formerly in an awkward dilemma, because by the old rules of law it was, in most cases, absolutely necessary to make a pro-

fert, although, perhaps, in point of fact, the party making it had not the deed so as to be able to give oyer of it. *Soreby v. Sparrow*, Str. 1126. 1 Wil. 16.

In what cases
no profert re-
quired.

But the courts have of late relaxed in this strictness, and have determined, that in all cases of extreme necessity, a profert may be dispensed with.

As if the deed be in the possession of the adverse party, or has been destroyed by him; or if it be lost by time or accident, or the like, where the party cannot make a profert of the deed.

But it may be
pleaded accord-
ing to fact.

In all which cases, the declaration or plea shall be good without any profert, the party pleading it according to the fact. *Read v. Brookman*, 3 D. & E. 151.

If profert made,
declaration
amended.

But if by mistake, he should make a profert, he must move the court to amend the pleading, and plead it according to the fact. *Totty v. Nibbitt*, B.R. Trin. 1784. *Matison v. Atkinson*, 3 D. & E. 153. n.

The fact may
be denied by
adverse party.

The adverse party may bring the matter into question by pleading, either that it is not his deed, or that it is not lost; and the party pleading it must give evidence to support his allegation that the deed is destroyed by time or accident, or as the fact stated. *Read v. Brookman*, 3 D. & E. 158.

If profert is made unnecessarily, oyer shall not be given. Sal. 497. *Morris's case*.

If defendant
party to deed.

Where defendant is party to an indenture himself, he ought not to demand oyer, but set it forth himself; and if he demands oyer, and plaintiff gives it him imperfectly, it is at defendant's peril. Sal. 498. and *vice versa*.

Or deed in
hands of third
person.

Where the bond or deed is in the hands of a third person, the court, on motion, will oblige him to give oyer and produce it. *White v. Earl of Montgomery*, Str. 1198. Sid. 50.

Or of defend-
ant.

So if it be in the hands of defendant when he can have no pretence to it. *Matison v. Atkinson*, E. 27 G. 3. B.R. 3 D. & E. 153. n.

Or indenture
lost, and there
is a counterpart.

If an indenture be lost, and there is a counterpart, the court will compel the party to shew his counterpart, and to plead thereto, otherwise they will grant an imparlance. Cro. Jac. 426. 2 Kib. 430. Sid. 386.

Oyer of letters
of administra-
tion.

Oyer may be demanded of letters of administration. *Garrard v. Early*, 2 Wil. 413.

Not of a record.

Or of a policy of insurance. Rep. Temp. Hard. 243.

But no one is entitled to oyer of a record. *The King v. Amery*, 1 D. & E. 150.

As of letters patent inrolled though pleaded with a profert, *Ibid*: or of an act of parliament. *Jeffery v. White*, Do. 477.

Yet

Yet in *Ld. Raym.* 347. 550. if defendant pleads *auter action pendent* in the same court, plaintiff may pray oyer of the record. But *Q.?*

But if oyer is granted of any instrument of record and it is set forth, although the party could not have insisted on such oyer, yet he shall be thereby intitled to take the whole instrument as part of his adversary's plea. *Jeffery v. White*, Do. 476.

How if granted though not intitled to it.

(B) Of the Time and Manner of demanding. and giving Oyer, and the Consequences of refusing it.

(B)

Oyer must be demanded before the rule to plead is out. *P. R.* 278. 299. *Hartley v. Varley*, Bar. 329.

When oyer to be demanded.

Or rather before the time for pleading is expired. *Imp. K. B.* 244.

For if defendant has eight days time to plead, he may demand oyer at any time within the eight days, though the rule to plead is out. 2 *Wil.* 413. *Duke of Leeds v. Vevers*, Bar. 268.

So it is in time if before a judge's order expires. *Imp. K. B.* 244. *Barber v. Satchwell*, Bar. 326.

In *B. R.* oyer may be demanded after imparlance, but not in *C. B.* *Ld. Raym.* 970. 3 *Kib.* 491. 2 *Lev.* 142.

There cannot be oyer in another term from that in which profert was made. *The King v. Amery*, 1 *D. & E.* 149. 3 *Sal.* 119. 1 *Mod.* 60. But see *Lord Raym.* 84.

If oyer be made after the time allowed, the other party may look upon it as a nullity and sign judgment. *Barber v. Satchwell*, Bar. 326.

If not in time, judgment.

The party craving oyer shall, after delivery of oyer, have as much time to plead or reply, &c. as he had at the time of demanding it. *Powel v. Gay*, Str. 705. *R. T.* 5 & 6 *G.* 2.

What time allowed to plead, &c. after oyer.

Whether the rule to plead or the like be out or not. *P. R.* 301. *Keedam v. Jackson*, Bar. 238. *Simpson v. Daffield*, Ibid. 254.

Wherever oyer is rightly demanded and not granted in due time, the plea is a nullity, and plaintiff may sign judgment. *Ld. Raym.* 347.

Consequence of refusing oyer.

There is no settled time for the plaintiff to give oyer, because it is in his own delay. Since the defendant is allowed the same time to plead after oyer as he had before it was demanded, let oyer be given when it may. *Ld. Raym.* 969. 2 *Str.* 1241. *Car.* 361.

But when the defendant is to give oyer of a deed, he is allowed two days for that purpose exclusive of the day on which

What time allowed to give in in *B. R.*

which it is demanded, and if Sunday is the last it is not reckoned: oyer demanded on the Friday evening, party has all the Monday following to give it in; judgment therefore signed on the Monday will be set aside. *Page v. Divine*, 2 D. & E. 40.

In C. B.

Though in C. B. two days inclusive of the day of demand has been held sufficient time. *Blaxland v. Burges*, Bar. 245. S. C. Cas. Pr. C. B. 95.

Which party to carry it to the other.

The party of whom oyer is demanded must carry it to the opposite party. *Page v. Divine*, 2 D. & E. 40.

Denial of oyer where it ought to be granted is error; otherwise of granting it where it ought not. Sal. 498. Raym. 970.

Formerly oyer was demanded in court, but now it is made by one attorney of the other, by a note in writing, thus:

Manner and form of demanding oyer.

A. B. v. C. D. in

The defendant demands oyer and a copy of the writing obligatory mentioned in the declaration in this cause, and the condition thereof underwritten.

To Mr. T. S. plaintiff's attorney.

Yours, &c.

Or

Plaintiff's demands oyer and copy of the deed mentioned in plea of defendant.

This need not be upon stamp, nor need the copy of the deed of which oyer is demanded be upon stamp. The party craving oyer is to pay for oyer and copy 4d. *per sheet*; but it seems judgment cannot be signed for want of paying for oyer. Imp. K. B. 260.

(C) (C) How the Deed must be set out on Oyer, and of the Use of craving Oyer.

How the deed must be set out on oyer.

Defendant by craving oyer undertakes to set out the whole of the deed verbatim, and if he only set it out in part, the plea is bad: plaintiff may, therefore, in such case sign judgment for want of a plea, or may move the court to quash it, which they will do, nor suffer defendant to amend. *Wallace v. Dutcheffs of Cumberland*, 4 D. & E. 370. But vide *Weavers Company qui tam v. Forest*, Str. 1241. Bar. 327.

But where oyer is given of a record set out in declaration, it need not be set out in plea, *Symonds v. Parmeter*, 1 Wil. 97.

If oyer be demanded of an indenture which refers to matter indorsed, it is not a complete oyer without a copy of the indorsement also. 6 Mod. Cas. 237.

To an action of debt on bond, defendant, after craving oyer, set it out truly and pleaded payment by the principal, he being a surety; plaintiff replies and put the pleas in issue, and then served defendant's attorney with a rule to abide by his pleas, and gave notice of trial; defendant returned the paper book, setting out false oyer of the bond and pleading as before; on which the plaintiffs enrolled the true condition and demurred.

Consequence if purposely set out falsely.

On the day of argument, which was the last paper day of the term, defendant's counsel objected to its being argued, because it was the last paper day. But

The court, on hearing the above facts stated, directed an affidavit of them to be made, made a rule *nisi* for striking out all the pleadings of defendant, that plaintiff should have judgment, and that defendant's attorney should pay all costs; and they intimated a strong inclination to grant an attachment against him. *Ferguson v. Mackreth*, 24 Geo. 3. B. R. 4 D. & E. 371. n.

If an imperfect oyer is given, defendant should not receive same by pleading over, but should still insist on want of oyer, otherwise it will be no variance. *Raym.* 1176.

Defendant should not accept imperfect oyer.

The only way of taking advantage of a deed being improperly set forth, or of other matters contained therein, &c. is by craving oyer and setting the deed out.

Of the use of craving oyer.

Declaration on bond, plea setting out the condition, which was to perform articles, defendant pleaded performance; plaintiff replied, that by the same articles it was further agreed, &c. on demurrer to replication, judgment for defendant, because plaintiff cannot alledge new matter in the articles without setting them forth on oyer. *Str.* 227. 2 Saund. 411.

So if declaration in an action on bail bond by the sheriff of Middlesex be in the plural number as sheriffs, whereas both make but one sheriff, oyer should be craved of the bond and condition, and it must appear on record, otherwise the court will not presume that it is a bail bond, and no advantage can be taken. *Ld. Raym.* 1135.

Defendant cannot plead that no such letters of administration as set forth in declaration, were ever granted to plaintiff without craving oyer thereof and setting them out in his plea. *Garrard v. Ealy*, 2 Wil. 413.

But although defendant may crave oyer, he is not bound to set out the deed in his plea, but may plead the general issue only, or any other plea to the merits. *Weavers Company v. Forrest*, *Str.* 1241.

SECTION III.

Of Imparlanee.

Imparlanee
what.

Imparlanee (*licentia interloquendi*) is a further day allowed to the defendant to answer or plead to the charge or declaration of plaintiff.

When a day is given to plaintiff to declare, it is called *dies datus*; but when after the declaration a day is given to defendant to plead, it is called an imparlanee.

Intent thereof.

The intent of an imparlanee is, that defendant may consider the nature of plaintiff's action and of his defence thereto; and also that he may have time to compromise the matter with his adversary: it has therefore been thought to arise from a religious principle, agreeable to the advice given in St. Matthew, c. 5. v. 25. "agree with thine adversary quickly, whilst thou art in the way with him."

Origin and history.

For the origin and history of imparlanee, as introduced and used in the courts of K. B. and C. B. see Boot's Treatise of a Suit at Law, 92. and Gilb. C. B. 42. &c.

Different kinds.

There are three kinds of imparlanee:

1st, A common or general imparlanee.

2d, A special imparlanee.

3d, A general special imparlanee.

Common or general imparlanee.

The common or general imparlanee is nothing more than a further day to plead till the next term, without saving or reserving to the defendant any exceptions or advantages to be taken by him to the writ or count; it is therefore entered of course, and after this general imparlanee, defendant cannot plead at all in abatement.

Special imparlanee.

A special imparlanee is a further day to plead as before, but *salvis exceptionibus tam ad breve quam ad narrationem*; so that after this imparlanee, defendant may plead in abatement of the writ or count, but not to the jurisdiction of the court; and this special imparlanee is granted of course in C. B. upon application to the prothonotary.

But by R. E. 5 Ann. in B. R. no special imparlanee shall be allowed, without leave of the court first obtained.

General special imparlanee.

The general special imparlanee, which, in fact, is a still more special one, is (*salvis OMNIBUS exceptionibus advantagiis quibuscumque*;) after which, defendant may even plead to the jurisdiction of the court; but this sort of imparlanee can only be obtained by leave of the court on motions; and this is discretionary, and must depend on particular circumstances, which are left to the decision of the court. *Grant v. Lord Sondes*, 2 Blac. R. 1097.

In

In case, therefore, defendant is entitled to an imparlance from the too late delivery of the declaration or otherwise, and he would wish to plead in abatement to the writ or count in a subsequent term, he ought not to suffer a general imparlance to be entered; but if in C. B. should leave a note with the prothonotary for a special imparlance to be granted, which will be done to answer that purpose: but if defendant would plead to the jurisdiction of the court, he ought then to move the court for a general or more special imparlance, as the prothonotary cannot grant that: but this cannot be done if defendant has already appeared to the process by attorney, as a plea to the jurisdiction must be *propiis personis*. *Ibid.*

The imparlance is entered on the record immediately after the declaration. If a special imparlance, thus: "And the said defendant saving and reserving to himself all and all manner of exception as to the aforesaid declaration of the said plaintiff, in his own proper person comes and craves leave to imparle to the said declaration of the said plaintiff, until on the morrow of All Souls, and it is granted him, &c."; then follows the plea. *Ibid.*

How entered on record.

The time for applying either to the prothonotary or the court for a special or general special imparlance is within the first four days of the next term, if declaration be delivered too late in the term for defendant to be obliged to plead thereto. *Grant v. Lord Sondes*, 2 Blac. R. 1094.

Time for applying for imparlance.

If plaintiff amends his declaration and pays costs, defendant shall have no imparlance. *Prac. Reg.* 18. *Know v. Wyche*.

When granted or not.

No imparlance after a peremptory rule to plead. *Bar.* 225. *Fitzwilliams v. Bishop of Hereford*.

Imparlance denied where notice had been served though not indorsed on the declaration. *Bar.* 226, 227. *Cam v. Gardner*.

When the defendant removes the cause by *habeas corpus* from an inferior court, no imparlance is allowed, though plaintiff does not declare before the effoin day of the next term. *Smith v. James*, 6 D. & E. 752. *Wood v. Wenman*, 1 Wil. 154.

No imparlance in real actions. *Bar.* 2. *Foster v. Kerkley*.

No imparlance where plaintiff is prevented from declaring before the effoin day by an effoin cast. *Rooke v. the Earl of Leicester*, 2 D. & E. 16.

In an action for words importing that plaintiff was guilty of the murder of A. B. defendant moved for an imparlance till next term, on affidavit that a prosecution was carrying on

on against plaintiff for his murder (committed on the high seas) in the court of admiralty, and he would probably be tried for the fact before Michaelmas term. The rule to shew cause made absolute. Imparlanes are in the discretion of the court, and it may be of ill consequence to enter into evidence concerning this murder in the action for words before trial of the fact. *Sibson v. Nivin*, Bar. 224.

Imparlance ordered, defendant being a lunatic. *— v. Higham*, Bar. 225.

When imparlance of course, and what time allowed for pleading.

If writ returnable last return.

In both courts, if the writ be returnable before the last return of any term, and the declaration not filed, and notice given four days exclusive before the end of such term, defendant is intitled to an imparlance. R. T. 22 G. 3.

So if the writ be returnable on the last return, in which cases defendant must plead within the first four days of the next term.

Or returnable one term, and declaration not delivered till next.

But if a writ be returnable one term, and declaration not delivered before the effoin day of the second term, the defendant is not obliged to plead in the same term, but is intitled to an imparlance, till the four first days of the next.

Provided defendant be in court.

But this is upon the supposition that the defendant is in court, by having appeared if the action be not bailable, or by having justified bail, if the action be bailable; for otherwise he is intitled to no imparlance, though the declaration be not delivered till the next term after the writ is returnable.

Not otherwise.

On motion for a rule to shew cause why the defendant should not have time to plead till the next term. The writ was returnable the last day of Trinity term, when bail were put in, but did not justify till the fourth day of the present Michaelmas term. On which day they did justify, and on the same day plaintiff delivered declaration. He insisted that plaintiff ought to have declared *de bene esse*, and by not declaring before the effoin day of the term, defendant was intitled to an imparlance, for which he cited a case in 1st Crompton's Practice, 126. which was in point. But per Buller Just. as defendant had not justified bail, plaintiff was not compelled to declare. There is no laches imputable to him for not declaring till all the defendants are in court. He need not declare *de bene esse*, nor is defendant in this case intitled to imparlance. The case cited was in the common pleas. *Rolleston v. Scott*, 5 D. & E. 372.

Where writ is returnable before the last return, and declaration delivered in due time, defendant must plead in four or eight days, as before mentioned. See Chap. 6. declaration (A), (B), (C). and post. Sec. 6. (A),

There

There are variety of old cases respecting imparlances, but most of them previous to the rules, 5 & 6 G. 2. and 22 Geo. 3. by which the times of pleading in ordinary cases are governed.

If four terms have elapsed since the delivery or filing of declaration, plaintiff must give the defendant a whole term's notice to plead, before he can sign judgment, which must be done by his giving defendant before the effoin day of the term notice of his intention to proceed the next term, by giving a rule to plead; and if defendant does not plead in the course of the term, plaintiff, having first served him with a rule to plead, may sign judgment, for the time does not extend beyond the term.

If four terms have elapsed, what notice necessary to be given.

Therefore where no proceedings were had for above a year, plaintiff two days before Hilary term gave notice of his intention to proceed on the 14th February; two days after Hilary term rule to plead was served, and on the 18th of April, in the course of same vacation, judgment signed for want of a plea, and it was held regular. *Milborne v. Nixon*, 2 D. & E. 40.

The same practice of a term's notice is necessary in all other stages of the proceedings, and from either party, when a year has elapsed since the last step taken.

But this only extends to voluntary delays by the plaintiff; for if the defendant has delayed the proceedings by an injunction, there is no occasion for a term's notice; and this in both courts. *Hayley v. Riley*, Do. 72. *Bosworth v. Phipps*, C. B. 11 Geo. 3. Ibid. n. 2 Blac. 784. *Walter v. Stewart*, Blac. 918.

An injunction, an exception to rule.

Although defendant be intitled to an imparlance, yet if he pleads any plea, notwithstanding it may be a nullity, plaintiff signs judgment as for want of a plea. Defendant has thereby waived his imparlance, and cannot set aside the judgment for being signed too soon. *Lockhart v. Mackreth*, 5 D. & E. 663.

What is a waiver of imparlance.

SECTION IV.

Of pleading in Abatement.

- (A) Of the Time and Manner of pleading in Abatement.
- (B) Of the Affidavit and Signature required in Pleas of Abatement.
- (C) Of the Judgment upon a Plea in Abatement.

(D) General

(D) General Observations and Rules as to Pleas in Abatement.

(E) Of moving the Court to amend Declaration, and of entering the *Cassetur Billa*.

Pleas in abatement are when the defendant shews cause to the court why he ought not to be impleaded, or if impleaded, not in the manner and form he now is. As these pleas enter not into the merits of the cause, but are dilatory, the law has laid certain restrictions upon them, as will be seen hereafter.

Pleas in abatement are threefold :

1st, To the jurisdiction of the court.

2^{dly}, To the person, either of plaintiff, or of defendant.

3^{dly}, To the writ and count.

But it would exceed the limits of this work, were we to enlarge upon the different kinds of pleas in abatement, and the law relating to them. We must therefore refer the reader for such information to Gilbert's Common Pleas, from p. 187 to 250. and to Bacon's Abridg. & Com. Digest. tit. Abatement, and content ourselves with laying down the general *practice* as to pleading in abatement. And first,

(A) (A) Of the Time and Manner of pleading in Abatement.

Within what time, and how, in B. R.

Pleas in abatement must be pleaded within four days after declaration delivered, or notice of declaration left in the office, provided it be delivered or notice given before the last four days in term; but if afterwards, so that defendant is not bound to plead to it that term, then he may plead in abatement within the first four days of the subsequent term, intitling his plea as of the precedent term in B. R. *Long v. Miller*, 1 Wil. 23. *Jennings v. Webb*, 1 D. & E. 278. or by entering a special imparlance. *Smith v. Miller*, 3 D. & E. 627.

By the case of *Doughty v. Lascelles*, it seems absolutely necessary for a special imparlance to be stated on the record. 4 D. & E. 520.

In C. B.

But in C. B. defendant must apply within the first four days of such term to prothonotary for a special imparlance, which is granted of course, and then plead in abatement. *Threlkeld v. Goodfellow*, Bar. 224. *Napper v. Biddle*, Bar. 334.

Sunday reckoned.

Sunday is to be counted one of the four days, unless the last. East. 5 Ann. *Jennings v. Webb*, 1 D. & E. 279.

If it be the last of the four days, defendant may file plea on the fifth. *Lee v. Carlton*, 3 D. & E. 642.

In B. R. the four days are both inclusive, so that where declaration is delivered on the sixteenth, the time for pleading in abatement expires the nineteenth. *Jennings v. Webb*, 1 D. & E. 278. *Harbord v. Perigal*, 5 D. & E. 210.

Four days reckoned inclusive.

So in C. B. *Biddleston v. Atcherley*, Cook Rep. 64. Imp. C. B. 260.

But the four days are to be reckoned from the service of notice of declaration, not from the filing the declaration itself; and there is no distinction in this respect between a declaration in chief and *de bene esse*. *Hutchinson v. Brown*, 7 D. & E. 298.

Plea in abatement cannot be pleaded after a general imparlance, but it may after a special one.

Not to be pleaded after general imparlance.

Defendant pleaded a misnomer in abatement after an imparlance, but it appeared on the record to be thus entered, "and A. B. who was arrested by the name of A. C. comes," &c. which the court held tantamount to a special imparlance. Judgment for defendant. *Brewster v. Capper*, Blac. 51. S. C. 1 Wil. 261.

Had the plea began, "and the said A. B. who," &c. it would have been bad. *Ibid.* *Roberts v. Moon*, 5 D. & E. 487.

But in the case of *Doughty v. Lascelles*, 4 D. & E. 520. such a plea as that in *Brewster* and *Capper* was held bad, and court said it could only be pleaded after a special imparlance, which should be stated on the record.

And in *Buddle v. Wilson*, 6 D. & E. 369. a plea in abatement after a general imparlance was held bad.

Before plea in abatement pleaded, declaration must be taken out of the office, or plaintiff may sign judgment.

Declaration must be taken out of office.

If a plea in abatement be filed after the time allowed, or without special imparlance if requisite, it is as no plea; and plaintiff having stayed till the expiration of the rule to plead, and no other plea being put in, he may sign judgment. *Jennings v. Webb*, 1 D. & E. 278. *Doughty v. Lascelles*, 4 D. & E. 520.

In what cases judgment may be signed if plea in abatement irregular.

So although no rule to plead has been regularly given, for defendant dispenses with the rule by pleading in abatement. *Brandon v. Payne*, 1 D. & E. 690.

Or even where a rule to plead has been irregularly served, as if it were served before delivery of declaration, for by pleading in abatement he waives the irregularity. *Ibid.*

If

If it appears on the record to be pleaded after general imparlance, it is bad on demurrer, or writ of error. 6 D. & E. 369.

Must be filed. A plea in abatement ought to be filed, not delivered. 1 D. & E. 278.

before 9 at night. A plea in abatement, like other pleadings and proceedings, ought to be filed before nine o'clock in the evening.

Where declaration was delivered 8th May, and plea in abatement delivered at plaintiff's house the 11th at eleven at night, plaintiff signed judgment, and held good. *Jennings v. Webb*, 1 D. & E. 278.

Cannot plead in abatement after assignment of bail-bond. If a man has forfeited his bail-bond, and the court in favour of him stay proceedings thereon, he cannot afterwards plead in abatement to the original action, but must plead in chief. Sal. 519.

Court will not interfere on motion in a matter pleadable in abatement. The court will refuse to order a bail-bond to be cancelled on an affidavit of defendant that he was not the person, but will leave him to his plea in abatement. In this case, the action was brought by *Salter qui tam v. Shergold*, defendant entered into bail-bond by the name of Williams, which was his right name, then moved to have the bond cancelled as above, which was denied. 3 D. & E. 572.

(B)

(B) Of the Affidavit and Signature requisite.

Statute requiring affidavit.

By 4 & 5 Ann. c. 16. "no dilatory plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such dilatory plea is true."

When not necessary.

In cases where the matter is pleaded in abatement, which appears upon the record (as variances), there needs no affidavit, but otherwise there does. *Ld. Raym.* 1409.

So want of addition requires no affidavit, because it appears on the face of the declaration. *Pract. Reg.* 5. *Parry v. Tomkin*.

Cepit in alio loco does not, nor need it be pleaded in four days, for it amounts to a plea in bar. *Bullythorpe v. Turner*, Bar. 353.

A dilatory plea, as a plea of commorancy, &c. to an indictment, must have an affidavit annexed, or it will be set aside. *Rex v. Grainger*, *Burr.* 1617.

When necessary.

Ancient demesne formerly did not, *Raym.* 1418. *Sed. Pract. Reg.* 2 Bar. 187. cont. *Hatch v. Cannon*, 3 Wil. 51. and now held that this plea cannot be pleaded without leave of the court, which must be moved for on affidavit, and which

which affidavit must be express and particular. Doe on dem. *Rust v. Roe*, Burr. 1048.

A foreign plea must be put in on oath, that is, it must be sworn that it is true, or such plea is not to be received, Stile. 373. 225. But a plea to the jurisdiction need not be sworn. Carth. 402.

Plea of privilege by a serjeant must have an affidavit. Str. 738.

So a plea of privilege by the clerk of the errors. And the affidavit ought not to be generally that the plea is true, but the particular facts alledged in the plea ought to be verified by the affidavit. *Cunningham v. Johnson*, Say. 10.

So plea of infancy, P. R. 5. *Broadmead v. Star*.

So that there is another executor not named. P. R. 4. *Wilson v. Palmer*.

An affidavit made by attorney is sufficient. Pract. Reg. 6. *Lumley v. Foster*. Bar. 344. The statute requiring only probable cause to be shewn.

Affidavit made by attorney sufficient.

The affidavit ought to be positive, and the words probable matter in the statute only extend to a matter of record, or to some other collateral matter, as to the truth of which there cannot be a positive affidavit. Yet where an affidavit was not positive, but from what was alledged therein it might fairly be inferred that the fact pleaded was true, it was held sufficient. *Pearce v. Davy*, Say. 293.

In both courts, a plea in abatement without an affidavit to support the truth of it, is no plea; and the plaintiff may sign judgment *instante*, as if no plea had been delivered. Str. 225. Carth. 402.

Judgment signed, if no affidavit or signature.

So if it be not signed when required by counsel or serjeant. P. R. 282. Anon.

(C) Of the Judgment on Plea in Abatement.

(C)

In all cases when judgment is given for defendant on his plea in abatement, it is *quod breve*, or *narratio cassetur*; — Of the judgment.

But judgment for the plaintiff depends upon the circumstance of its being given upon demurrer, or upon issue joined on the plea in abatement.

In the first case it is *quod respondeat ouster*. In the last it is peremptory, *quod recuperet*.

When respondeat ouster.

The reason of this distinction is, that every man is not presumed to know the matter of law, which he leaves to the judgment of the court; and therefore, where plaintiff

When final.

demurs to defendant's plea, the judgment against defendant upon the demurrer is, that he must answer over. But every one must be sensible when he pleads a fact, whether that fact be true or false; and if he chooses to put the whole weight of his cause upon such an issue, when he might have pleaded in chief to the merits, it is an admittance that he has no other defence; and therefore, if a verdict be against him, the judgment ought to be final. *Eichorn v. Le Maître*, 2 Wil. 366. 2 Blac. Rep. 368. Yelv. 112. Vent. 22. 2 Shaw. 42.

Jury to assess damages if final.

In such case, therefore, the jury, at the trial of the issue in abatement, ought to assess the damages. If, however, they should omit so to do, such omission can only be supplied by a *venire de novo* being awarded. *Ibid.* 2 Wil. 366.

If they neglect so to do, a *venire fac. de novo* to be awarded.

Defendant pleaded misnomer in abatement to an action of assumpsit. Plaintiff replied, that he is known as well by one name as the other, and thereupon issue was joined, and verdict for plaintiff; but the jury did not assess the damages. In such case the court cannot order a writ of inquiry to assess damages to supply the omission of the former jury in not assessing them, but a *venire facias de novo* must go, because no attaint would lie against the jury upon the writ of inquiry, were they to give excessive damages, that being only an inquest of office; whereas an attaint would lie against the jury who tried the issue, if they had given outrageous damages. 2 Wil. 367.

But this is only in such actions which sound in damages; for in actions where a specific thing is demanded, as debt, &c. if issue is joined upon a fact in a plea in abatement, and verdict thereon for the plaintiff, the judgment is peremptory, *quod recuperet*.

Consequence of wrong judgment.

If a wrong judgment be given as in chief, when it was on demurrer, and ought only to have been *respondeas ouster*, it will be reversed on error. Str. 532.

Defendant pleaded in abatement *nul tiel person in rerum natura*. Plaintiff replies, that there is, viz. at Westminster, demurrer *inde* and joinder, in which he prays judgment and his damages, which, being in chief, is wrong; for it ought to be that he may answer over. *Anon.* B. R. 1 Wil. 302.

If plea in abatement concludes in bar, or, vice versa, what judgment.

If defendant pleads in abatement, and concludes as in bar, that conclusion makes it a plea in bar; and in such case judgment final is given, and not merely a *respondeas ouster*. So when a plea begins in bar, though the matter be in abatement, and it concludes in abatement, yet it is a plea in bar, and thereon judgment final shall be given.

Vide

Vide Lord Raym. 1018. and authorities there cited; and also Lord Raym. 1205.

A plea of misnomer in abatement must conclude with praying judgment of the bill; praying that the same may be quashed, was held ill on special demurrer. *Hixon v. Binns*, 3 D. & E. 185.

To a plea of misnomer praying judgment of the writ, replication began, "That the declaration ought not to be quashed," and on special demurrer held good. *Sabine v. Johnson*, Pull. C. B. 60.

In dilatory pleas the greatest precision is required; and if the defendant do not comply with the necessary forms in pleading same, plaintiff may take advantage of it on special demurrer. *Roberts v. Moon*, 5 D. & E. 488.

If defendant demurs in abatement, the court will give final judgment, because there can be no demurrer in abatement; for if the matter of abatement be dehors, it must be pleaded; if intrinsic, the court will take notice, *ex officio*. Salk. 220. Pl. 7. 6 Mod. 198.

Upon a judgment of *respondeas ouster*, defendant has four days time to plead; but this is said to be in the discretion of the court. Comb. 19.

What judgment if defendant demurs in abatement.

What time defendant has to plead after judgment.

(D) General Observations on pleading in Abatement.

(D)

No plea in abatement shall be received after a *respondeas ouster*, for then they might be *in infinitum*.

Neither court will suffer a plea in abatement to be amended. Imp. K. B. 242. C. B. 261. P. R. 21. *Lyde v. Heale*.

No plea in abatement after *respondeas ouster*.

Plea in abatement not amendable.

A defendant cannot have two dilatories.

In pleas in abatement which relate to the person, there is no necessity of laying a venue; for all such pleas are to be tried where the action is laid. 12 Mod. 125. Carth. 363. Salk. 4. *Neale v. De Garay*, 7 D. & E. 243.

No need of venue.

Plea in abatement set aside on motion, both the plea and affidavits being wrong intitled.

Bad, if wrong intitled.

Defendant was sued by the name of Finis Dinas; he pleaded in abatement that his name was Phineas, and not Finis: but both the plea and affidavit to verify it, were intitled in a cause betwixt Clixby plaintiff, and Finis Dinas defendant. Rule absolute to set aside the plea. *Clixby v. Dinas*, Bar. 348.

After a plea in abatement, no exceptions can be taken to the declaration. Carth. 172.

After plea, no exception to declaration.

Nor can advantage be taken of any errors in the declaration on a plea in abatement, for in such case the defendant ought to demur. 3 Salk. 19.

No costs in
abatement.

Defendant is not entitled to costs, if he succeeds on a plea in abatement. *Barber v. Palmer*, 6 D. & E. 524.

(E) (E) Of moving Court to amend Declaration, and of entering *cassetur billa*.

May move court
to amend declaration on
misnomer pleaded.

Upon a good plea in abatement plaintiff ought either to take out a summons to amend his declaration, as in case of a misnomer being pleaded he may do upon payment of costs, and this saves the entry of the *cassetur billa*; or he must discontinue his action and begin *de novo*; but if he does not discontinue before he declares afresh, defendant may plead autre action pendent, and it will be afterwards too late to discontinue. Lord Raym. 1014. *Knight's case*.

The way to discontinue is by entering a *cassetur billa*, as follows:

Of the *cassetur*
billa.

Get a roll, enter a memorandum of the term the declaration is delivered, and the plea at the foot thereof, then say (and thereupon the said plaintiff says, that he cannot deny the said exception of the said defendant above by his plea taken to his said bill, but admits the same to be true; therefore it is considered by the court of our said Lord the King here, that the said bill of the said plaintiff be quashed, &c.

Carry the roll to the clerk of the judgments, if in K. B.; to the Prothonotary in C. B. and docket same; pay 4d. per sheet in K. B. 8d. in C. B.; and the *cassetur billa* being marked thereon, carry same to clerk of treasury at Westminster to be filed, and then begin *de novo* with your action.

After which
plaintiff may
begin *de novo*,

It seems that plaintiff may confess the plea, and enter a *cassetur breve* upon the roll, and bring a new action, without moving the court for leave, or paying costs. *Allen v. Maxey*. *Osborn v. Haddock*, Prac. R. 6.

or declare by
the bye.

So after entering quod *billa cassetur* on the roll, he may, at any time during the same term in which the writ is returnable, deliver a declaration by the bye against defendant. *Miller v. Andrews*, 5 D. E. 634.

SECTION V.

Of paying Money into Court.

- (A) The Meaning and Origin thereof.
- (B) Of the Manner and Time of paying Money into Court.
- (C) In what Actions and on what Counts Money may be paid into Court.
- (D) Of the Consequences of paying Money into Court, and the Costs to which Plaintiff is entitled.
- (E) Of bringing a further Sum into Court.
- (F) Of Defendant's refusing to pay the Costs, and how Plaintiff is to proceed.

(A) The Meaning and Origin thereof.

When the dispute is not whether any thing at all is due to the plaintiff, but only how much; the defendant, before he pleads, is at liberty to move the court for leave to pay so much into court as he thinks is really due. On which the court makes an order to the following purport: "That defendant shall have leave to bring into court the sum he moves to pay in; and that unless plaintiff accept such money in full discharge, with costs to be taxed by the master or prothonotary, the sum brought in shall be paid out of court to the plaintiff or his attorney, and the amount thereof be struck out of the declaration, and no evidence given thereof upon the trial." The effect of which rule is, that if upon trial of the issue between the parties, the jury shall not assess damages to the plaintiff exceeding the sum so brought into court, there must be a verdict for the defendant, and the plaintiff shall have no costs, but shall pay to the defendant or his attorney costs to be taxed, &c. But if the jury give more, then the said sum so paid into court goes towards satisfaction of the judgment, &c. *Hallet v. E. I. Comp.* Burr. 1126.

The first motion to bring money into court was in Kelyng's time, and introduced to avoid the hazard and difficulty of pleading a tender. Str. 787.

Or rather, perhaps, to prevent litigations and unnecessary expence, by giving defendant an opportunity to settle plaintiff's

tiff's demand, when he never had it in his power, or had neglected, to make any legal tender.

(B) (B) Of the Manner and Time of paying Money into Court.

How to pay money into court.

No sum, how small soever, can be paid into court without leave obtained on motion. But application to pay money into court requires no notice of motion, or affidavit of facts.

It is done in the manner following:

In B. R.

When there is no doubt but that money may be paid into court, give instructions to counsel for that purpose, with 10s. 6d.; indorse thereon, "Please to move to pay 5l. 10s. into court;" and on his signing it, carry it to the signer of the writs, pay the money to him, who will give receipt for same; pay 2s. 4d. besides poundage; then carry brief and receipt to the clerk of the rules, who will draw up rule; pay 7s.; serve copy thereof on plaintiff's attorney, and at the same time deliver your plea.

In C. B.

If the action be such as that there can be no doubt but that money may be paid into court, and if the sum paid in does not amount to more than 5l. apply to the secondary for a treasury rule for that purpose; pay 6s.; take it to prothonotary's, and the clerk will receive the money and put a receipt in the margin, pay 1d. in the pound, 1s. 4d. for receipt, and 2s. for entering plea; serve copy of rule on plaintiff's attorney.

If the sum be more than 5l. then a serjeant's hand to a brief is requisite; and if the general issue be pleaded, he signs it of course: take it to secondary as before, and proceed as above.

But if defendant pleads other pleas than the general issue, give two briefs to serjeant with 10s. 6d. each, one to move to plead double, and the other to pay money into court; take them to secondary as before, and proceed as above.

If in vacation, get a judge's order to warrant the rule.

If the money is to be paid into court a week after the term ended, a judge's order is requisite to authorize clerk of rules to draw up rule; but in this case there must be a counsel's hand to a brief for that purpose, as the order states, that clerk of rules be at liberty so to do, on producing a counsel's hand for that purpose. Imp. B. R. 286.

How if plaintiff accepts the money.

If plaintiff accepts the money in full discharge, he must have costs to the time the money is paid in. For which purpose he must get office-copy of the rule, and obtain

an

an appointment from the master or prothonotary, and serve the same on defendant's attorney to tax the costs. Formerly this was the defendant's duty, but now it is plaintiff's. *Kabell v. Hudson*, 4 D. & E. 12. R. M. 31 G. 3.

And unless the plaintiff takes this step, it is considered that the plaintiff intends to proceed in the action to recover a larger sum than that paid into court. R. M. 31 G. 3.

If defendant does not pay the costs, proceed as directed afterwards (F).

The agent's taking money out of court is the same as plaintiff himself. 1 D. & E. 711.

But if the plaintiff be not satisfied with sum paid in, he may still take it out of the office (by carrying an office-copy of the rule to the signer of the writs, or prothonotary) in part payment, and may then proceed to trial; and if on the trial he does not recover a greater sum than was paid in, he will be nonsuited, and must pay costs to the defendant. How if he does not.

The chief clerk's fees upon paying money into court is 20s. for every 100l.; if under 10l., 2s. R. 5 Jac. 1.

When the defendant is entitled to pay money into court, it is a matter of course before plea pleaded, and now even after plea it is perpetually done by obtaining a judge's order for that purpose. No inconvenience ensues to either party from this practice, because if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of justice; for if the defendant pays into court what is really due, the plaintiff ought in justice to take it. *Griffiths v. Williams*, 1 D. & E. 711. 1 Wil. 157. Str. 1271. 1267. At what time money to be paid into court.

After regular judgment signed, though set aside, defendant cannot have leave to bring money into court. *Burge's v. Pallamounter*, Bar. 281. *Tidmarsh v. Smith*, 285. P. R. 289. Caf. of Pr. C. B. 85.

An offer made by a bill in equity to pay money, shall be tantamount to the money having actually been brought into court, if an action at law be afterwards had under a decree from the court of chancery. *Burr*, 1361.

(C) In what Actions and on what Counts Money may be paid into Court. (C)

As to the particular cases in which money may be paid into court, the chief distinction is this; That where the General principle.

sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury, the defendant may pay money into court, and have so much of plaintiff's demand upon him struck out of the declaration; and if plaintiff will not accept thereof, he shall proceed at his peril. *Burr.* 1120.

On the contrary, where it is an action for damages for any injury sustained, which damages are to be assessed by a jury, money cannot be paid in.

The above is the general rule which governs the cases respecting bringing money into court.

How in particular actions.

But to be more particular, I shall consider in what actions money may or may not be brought into court, agreeable to their nature, in alphabetical order.

Actions on the case.

Denied in an action of account. *Anon.*

Allowed in an action on a policy of assurance. *Stat.* 19 G. 2. c. 37. s. 7.

In a special action upon the case for damages done to a chaise let to hire by immoderately driving, not allowed. *Str.* 787.

Nor in an action for injuring common by burning turf. *Anon.*

Nor in an action against a sheriff for a false return to a *fiery facias*. *Bowles v. Fuller*, 7 D. & E. 335.

Covenant.

Nor in covenant, unless for non-payment of rent. *Bar.* 282. 286. 289. Or where the breach is assigned with equal certainty. *Bar.* 284.

But in covenant and breach for non-payment of rent, and not repairing, &c. it was moved to bring in so much for the rent; and as to the other breach, that plaintiff might proceed as he thought fit; *et per Trevor*, all the judges have agreed that it is but reasonable to allow it, that it does not differ from debt for rent; for though it be covenant, yet it is for a sum certain. So defendant may move, that upon payment of what shall appear due for rent, proceedings as to that shall stay, and the court will refer it to the master. *Anon.* 1 Wil. 75. *Salk.* 596.

In covenant the breach was assigned in a sum certain, viz 11*l.* for not dressing corn, and leave was given to bring in the money on the common rule. *Bar.* 284. *Walmouth v. Houghton*.

Not allowed to be paid in on an action of covenant generally, but it may upon any particular breaches assigned for non-payment of rent, or for an increased rent. *Blac. Rep.* 837. *Fullwell v. Hall*, and *Walmouth v. Houghton*, *Bar.* 284.

In

In covenant on charter-party, money paid in on two of the breaches for freight and demurrage. *Burr.* 1120.

In debt, you cannot bring money into court unless it is for non-payment of rent. *Pract. Reg. C. P.* 257. and even that was denied in *Salk.* 597. & *Bar.* 286.

So it was refused in debt for goods sold; court saying they never did it in debt. *Str.* 890.

In debt on bond with a penalty, defendant may bring into court the principal, interest, and costs due on such bond, which shall be deemed a satisfaction, and the court may give judgment. 4 & 5 *Ann. c.* 16. s. 13.

Before this statute defendant was obliged to bring in the whole penalty. *Salk.* 597.

This statute does not extend to bonds conditioned for good behaviour, nor for performance of covenants; so that to such bonds money cannot be brought in. *Wright v. Bennington*, *Bar.* 286.

Condition of a bond was to pay 40*l.* by 5*l.* per annum, and defendant had leave on the statute of Anne to bring the arrears of 5*l.* per annum into court. *Str.* 814. though in *Str.* 515. not long before it was denied.

Condition of a bond was to pay money by instalments, and the court gave leave for defendant to bring the money due by that instalment into court; but not to stay plaintiff from signing his judgment for the penalty incurred by non-payment of the instalment. But although plaintiff in such case may sign judgment for the penalty, the court will not let him take out execution until the payments become due. *Darby v. Wilkins*, *Str.* 957. But in C. B. on a bond to secure an annuity by instalments, a rule was made absolute to stay proceedings on payment of the 3*l.* the only instalment due, and costs. *Bar.* 288.

The statute of the 4 & 5 Anne, which enables defendants to pay money into court on bonds, ought to have a most liberal construction; and the courts of law and equity ought to exercise their own authority to extend the spirit and reason of it. It meant, that in cases of securities by way of security, the clear final justice of the case should be attained in the courts of law. *Bonafous v. Rybot*, 3 *Burr.* 1373, 1374.

The just intent of a bond is to secure principal, interest, and costs by a penalty, and suffer the debtor at any time to save the forfeiture by performing the intent. *Ibid.*

Bonds conditioned for payment of money by instalments are within this act. *Ibid.*

But if a bond is conditioned for payment of a gross sum at a certain fixed day, and by a subsequent agreement the debtor

Debt.

Debt on bonds.

Bonds for performance of covenants.

Annuity bonds.

To pay money by instalments.

debtor is allowed to pay it by instalments, provided that he pay it punctually, otherwise the agreement and defeasance to be void; if the debtor does not pay it punctually they are void, and the gross sum is due to the obligee. *Burr.* 1374.

And unless the debtor pays the whole money, he cannot be relieved from the penalty. *Ibid.*

In debt on bond, with condition to account for money to be received, the court will not stay proceedings upon paying the penalty into court, because damages may be recovered beyond that amount; for the penalty of a bond is not the limitation of damages to be assessed by a jury. *Lord Lonsdale v. Church*, 2 D. & E. 388.

In debt on bond for 2400*l.*, proclamation money of North Carolina, averring that it was of a certain value, court would not permit defendant to pay the 2400*l.* proclamation money into court. *Cuming v. Monro*, 5 D. & E. 67.

The acceptance of interest up beyond the time of the unpaid instalment is no waiver; for the obligee was entitled to receive it as part of the original debt secured by the bond. *Burr.* 1375.

Bastardy bond.

The whole penalty of a bastardy bond may be brought into court. *Brangwin v. Perrot*, 2 Blac. Rep. 1190.

Debt on judgment.

Original defendant obtained judgment of *non pros*, and then brought debt on that judgment for the costs, in which he had judgment by default, and afterwards brought another action of debt on this last judgment, and thereon also signed judgment; which last judgment the original plaintiff moved to set aside on bringing into court the debt and costs of the second judgment. On shewing cause against this rule, the court thought that he himself had given the first provocation, and had been guilty of the first laches, and therefore discharged the rule, but without costs, directing execution to stay, as the money on the former judgment was paid into court in order to discountenance such oppressive proceedings. *Simpson v. Stone*, 2 Blac. Rep. 785.

Action for dilapidations.

In an action for dilapidation, the court refused to let defendant bring money into court, and said it was like trespass, where you cannot do it, though you may tender amends. *Squire v. Archer*, Str. 906.

Ejectment.

In ejectment for non-payment of rent, the tenant or assignee may pay into court all the rent in arrear and costs, and proceedings shall cease. 4 G. 2. c. 28.

But before this statute it was allowed by the court. *Salk.* 597. And the reason given was, because the action of ejectment subsists entirely upon the rules of the court.

After.

After judgment against casual ejector, and before any writ of possession executed, the court made a rule to stay proceedings on payment of all rents and costs. Str. 900. *Goodtitle v. Holdfast*.

In ejectment by mortgagee, the mortgagor may bring the principal, interest, and costs into court, and the court will make a rule to stay proceedings. Str. 413.

Proceedings on a mortgage may be stayed by paying mortgage-money, interest, and costs, without payment of a bond. Str. 1107. *Archer v. Snatt*.

In replevin and avowry for rent, defendant allowed to pay it into court. Salk. 597.

Replevin.

The plaintiff in replevin may pay the rent into court, for which the defendant avows. *Vernon v. Wynne*, 1 H. Bl. 24.

Where Serjeant Kerby said, he remembered in an action of trespass where the defendant had justified for non-payment of rent, plaintiff was permitted to pay the rent into court.

In actions on penal statutes, the court on motion will give leave to pay the penalty into court with costs. *Walker v. King*, Tr. 31 G. 2. & Str. 1217. *Stock v. Bagle*, 2 Black. 1052.

Statutes penal.

If the court see reason to suspect that a *qui tam* action is prosecuted merely for the issue money, they will on motion permit it to be paid into court, to abide the event of the suit. *Parker qui tam v. Macfarlan*, 3 D. & E. 137.

In trespass, money cannot be brought into court, though amends may be tendered. Str. 906.

Trespass.

In an action of trespass of *mesne profits*, money cannot be paid into court. *Holdfast v. Morris*, 2 Wil. 115.

In an action of trespass, assault, and false imprisonment, against a justice, he may, if he has omitted to tender amends, bring money into court, pursuant to 24 G. 2.; but then it must appear, by the production of the previous notice to be given in such case, and an affidavit or the like, that the action is in fact brought against him as a justice, for some misbehaviour in his office. *Casbourn v. Ball*, Blac. 859.

But even in trespass there may be certain circumstances which may induce the court to stay proceedings upon the defendant's restoring the goods seized, or paying the full value of them with costs. *Pickering v. Truste*, 7 D. & E. 53.

In *trover* for money, the court will give leave to bring the money declared for into court. Str. 142.

Trover.

But

But trover being an action for damages, you cannot oblige the plaintiff to accept the thing itself; therefore the goods and costs cannot be brought and paid into court. *Olivant v. Berino*, 1 Wil. 23.

Str. 822. 1191. Goods refused to be brought in in trover;—

Note brought in.

But a note was brought in, and the court held it reasonable that goods as well as money should be so. *Tuney v. Clark*, Caf. of Pr. C. B. 59.

How if goods are cumbersome.

If the goods be cumbersome, though they cannot be brought into court, court will make a rule for plaintiff to shew cause why he should not accept them. *Cook v. Holgate*, Caf. of Pr. C. B. 130. P. R. 260.

Leave given to bring a book into court, but this was only granted on the particular circumstances of the case. For in the case of *Harding v. Wilkin*, court refused to grant a rule nisi, on motion to bring a gold watch and diamond ring into court in trover. *Harding v. Wilkin*, Say. 120. *Catling v. Bowling*, Say. 80.

General rule as to bringing goods into court in trover.

S. P. in C. B. *Whittens v. Fuller*, Blac. 902.

There are several contradictory cases in the books on this point; but the better opinion seems to be, that in certain cases, goods in trover may be brought into court; but it must depend on the circumstances of the case; which will be better explained by the following case, where it was held by Lord Mansfield:—"That where trover is brought for a specific chattel of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages; there the specific thing demanded may be brought into court: (and Mr. Justice Wilmot said, This was the more reasonable, as this action of trover comes in the place of the old action of detinue:) but where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought in." It is a pity, said Lord Mansfield, that a false conceit should in judicature be repeated as an argument, "The court does not keep a warehouse." What then? What has a warehouse to do with ordering the thing to be delivered to the plaintiff? Money paid into court is payment to the plaintiff. The reason and spirit of cases make law; not the letter of particular precedents. In trover for money numbered, or in a bag, the court have ordered it to be brought in; yet the

the jury may give more in damages, they may allow interest (and in some cases they ought).

"The reason holds to every other case, where a thing clearly remains of the same value; yet the jury may give damages for the detention."

"I remember its being done twice or thrice in things of small value. It ought to be done to prevent vexatious litigation, which a plaintiff may be tempted to pursue, when in all events he is sure of costs. It ought to be done, because it is the specific relief."

"It ought to be done, because at the trial, when the thing remains in the same condition, there generally is a rule 'to deliver it.'"

"An estimated value is a precarious measure of justice, compared with the specific thing."

"I am aware of the cases where a laced head, a gold watch, a diamond ring, and Chinese pictures, were refused to be brought in."

"But as I think 'such motions ought neither to be refused nor granted of course.' They must depend upon their own circumstances. No injury is done the plaintiff, if the court should think 'he ought not to proceed for damages beyond the specific thing,' because he may still proceed for more at the peril of costs, and so he ought."

But in this particular case, the goods were altered and their value changed; and therefore the rule refused. *Fisher v. Price*, Bur. 1364.

The general rule is, as the cases above cited demonstrate, that money can only be paid into court in actions where the damages are liquidated; so that even were defendant to get a judge's order for payment of money into court, where the demand was for unliquidated damages, such payment would be irregular.

But if the plaintiff take the money out of court, he thereby waives the irregularity; and should he proceed in the action, he cannot afterwards have a verdict, unless he recover more than the sum paid in. *Griffiths v. Williams*, 1 D. & E. 710.

Where the plaintiff makes that kind of demand which is substantially for a specific sum of money, the defendant may pay money into court. But in torts, where it is a mere question of damages, a chance, as in such cases defendant was originally in the wrong, he must take the event of that chance.

Where a carrier has given notice in printed terms, that he will not be answerable for goods above the value of a certain

General rule as to paying money into court. In what actions.

If paid improperly, how irregularity cured.

How a carrier may pay money into court.

certain specified sum, unless paid in proportion, in an action brought against him for the loss of goods above that value, (but for which he has not been paid an extraordinary price,) he may pay into court the sum specified. *Hutton v. Bolton*, 1 H. Bl. 299. *a.*

Must not bring money on some counts, and demur to rest.

The court will not give defendant liberty to bring money into court on some of the counts in the declaration, and demur to the rest. For the reason of making the rule to bring money into court is to prevent vexation, and make an end of the cause. *James v. Hosey*, Pr. R. C. P. 256, Cas. of Pr. C. B. 48.

But it may be brought in on some, and issue taken on others.

But money may be paid in on some of the counts, or on some of the breaches assigned, and plaintiff may accept the same, and proceed, if he thinks proper, on the other counts or breaches.

As in covenant on charter-party, where several breaches were assigned, money was paid in on two for freight and demurrage. *Hallet v. E. I. Company*, Burr. 1120. *Baillie v. Cazelet*, 4 D. & E. 579.

So two breaches were assigned in covenant amongst others: 1st, For non-payment of rent: 2^{dly}, For 5 *l.* an acre advanced rent for ploughing meadow ground; and the court allowed money to be paid into court on these breaches, but not generally. *Fulwell v. Hall*, 2 Blac. R. 837.

What defendant must plead.

Formerly when a rule was obtained to bring money into court, defendant must have pleaded the general issue, and could not plead double. *Buckley v. Warren*, P. R. 317.

Sometimes double pleas allowed.

But this strictness has been since dispensed with. And in C. B. the court gave an administratrix leave to bring 5 *l.* 5 *s.* into court on the common rule with respect to the 7th and 8th counts, (there being nine,) and as to the rest to plead the general issue, statute of limitations, and set-off. *Hellier v. Hallet*, Bar. 286.

So leave was given to plead bankruptcy to one count, bring money into court on the common rule, and plead the general issue to the other counts. *Hall v. Lane*, Bar. 350.

So leave was granted to bring money into court on the common rule, and plead *plene administravit*, and the general issue to the whole. *Austin v. Ross*, Bar. 287.

How, if several defendants.

Where there are several defendants, money cannot be paid into court by one only. By Gould, Blackstone, and De Grey, Nares cont. *Kay v. Panchiman* and others, Blac. 1030.

Where one defendant suffers judgment by default, and a second is outlawed, the third shall not bring money into court. *Ibid.*

(D) Of the Consequence of paying Money into Court, and of the Costs to which Plaintiff is entitled.

(D)

Payment of money into court is an acknowledgment of being liable to the action. Burr. 2640. *Burrow v. Skinner*.

To defendant.

And in *Jenkins v. Tucker*, 1 H. Bl. 93. where there was a demurrer to evidence, Lord Loughborough said, this demurrer to evidence strikes me as being extremely absurd, since by payment of money into court, the defendant admits a cause of action, so that where money is paid into court there can be no such thing as a nonsuit.

Payment of money into court is only an acknowledgment by the defendant, that the plaintiff has a right to maintain the action, and is entitled to recover so much as the sum paid. But it does not preclude defendant from taking any objection to the action beyond that sum, although such objection, had not the money been paid in, would have been a bar to plaintiff's suit. *Cox and another executors, &c. v. Parry*, 1 D. & E. 464.

An acknowledgment of the action.

If plaintiff declares in *indebitatus assumpsit* on an agreement, and defendant pays money into court, he admits the agreement; that is, if the declaration is on the agreement only. But if there are other counts, as money had and received, or the like, he may pay money into court on one of those counts, and then he will not admit the validity or extent of the agreement.

Defendant had brought money into court on the common rule; plaintiff would not accept the same, but proceeded to trial, and was nonsuited. Upon which defendant moved in the treasury, (in C. P.) that in regard as plaintiff was out of court by the nonsuit, he might have the money back, and produced the *posse*. But the judges held, that defendant, by having paid money into court, had admitted that plaintiff was entitled at all events, and therefore defendant could not have the money again. Afterwards plaintiff brought a new action, and the court made a rule that plaintiff might have the money brought in if he thought fit; but if not, that the money brought in should remain to the new action. *Lane v. Wilkinson*, Pr. Reg. 250. Rep. & Cases of Pract. C. P. 36. Str. 1027. *Cox v. Robinson*.

Whether defendant can in any cases, and when, have money back again.

The like resolution in a similar case as above, and leave given for defendant to bring more money in upon the new action. *Dickins v. Tallowin*, Prac. Reg. 252.

Money was paid into court; plaintiff proceeded, and recovered a less sum: whereupon defendant moved, that he might

might

might have the money out of court towards his costs, and it was granted. *Anon.* Bar. 280. *Rathbone v. Stedman*, Caf. of Pr. C. B. 54. 117.

How, if plaintiff dies ;

Money was paid into court, and before trial plaintiff died, whereupon defendant moved to have the money paid back; but the court was of opinion it ought not to be paid back. The courts have not yet gone so far as to order payment in such case to the plaintiff's executor, but it seems reasonable so to do, if the executor is willing to accept it; and after trial, it is plain, the executor is entitled to the money paid in, though a smaller sum is recovered. Had plaintiff lived, and refused to accept the sum paid in, and had gone to trial and been nonsuited, yet the defendant could not have had the money back out of court, plaintiff being entitled thereto at all events. *Crockay v. Martin*, Bar. 281. Caf. of Pr. C. B. 129. P. R. 255.

or defendant ;

So if defendant dies, court will not return money to his executors. *Knapton v. Drew*, Bar. 279.

or judgment arrested;

Judgment was arrested, and consequently no costs on either side. But the court ordered the money brought into court to be paid to the plaintiff. *Fisher v. Kitchingman*, Bar. 284.

or money paid by mistake.

Money, if paid into court, though by mistake, is so far in the custody of the law, that it cannot be got out in any way. It is the only exception where an action for money had and received will not lie for money paid by mistake. *Malcolm v. Fullarton*, 2 D. & E. 645.

How, in cases of executors or administrators, plaintiff or defendant.

To an action by an executor or administrator, the courts formerly would not allow defendant to pay money into court, because the executor or administrator is not liable to costs, as appears by Salk. 596. But in the case of *Crutchfield v. Scott*, Str. 796. it was held it might be done, and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs.

If verdict for less sum, or a nonsuit.

The general rule in all cases is, that if the plaintiff choose to accept the money when it is paid into court, or even before trial, the court will give him his costs up to the time of the defendant's paying money into court; but if he will, notwithstanding, proceed to trial, and fail, he loses all claim to those costs. *Kabell v. Hudson*, 4 T. R. 21. *Stevenson & York*, Ibid. 10.

Consequence to plaintiff if he proceeds for further damages

If defendant pays money into court on an action properly commenced by executor or administrator, and the executor or administrator proceeds afterwards, he does it at his peril as to costs. 3 Salk. 105.

As to costs, if he discontinues.

If plaintiff proceeds in the action after he has taken the money brought in out of court, and then discontinues, he shall

shall not have his costs even up to the time of bringing the money into court. *Berwick v. Symonds*, Say. 196.

But it is now held otherwise; and where money has been paid into court, and plaintiff proceeds afterwards in the suit, and then discontinues, he is intitled to all his costs to the time of the money being so paid; but is liable to pay defendant his costs from that time to the time of discontinuance. See the rule obtained for that purpose. *Hartley and others v. Bateson and others*, 1 D. & E. 629. 711. Bar. 280. P. R. 255.

The mode is, to move why the master should not be directed to tax the costs of the plaintiff to the time of paying the money into court, and the defendant's costs from that time to the time of countermanding notice of trial, (i. e. the time of discontinuance, whenever it may be,) and why the defendant should not pay the balance to plaintiff. Upon which a rule *nisi* will be granted. *Hartley and others v. Bateson*, 1 D. & E. 629.

In what form
notice to be.

If the defendant pay money into court, and the plaintiff proceed to trial when a juror is withdrawn, the plaintiff is not intitled to the costs up to the time of paying money into court. For *per Cur.* whenever a juror is withdrawn, each party must pay his own costs. And *per Buller J.* the form of the rule decides this question; for it was part of the rule, that if the plaintiff would not accept of the money brought into court, with the costs, &c. the said money should be struck out of the declaration: then if it be struck out, that is not considered as part of the declaration. *Stodhart v. Johnson*, 3 D. & E. 657.

If proceeds to
trial, and juror
withdrawn.

In the case of *Griffiths v. Williams*, 1 T. R. 712. After verdict, which was for plaintiff, but only for the exact sum defendant had paid into court, it was moved that the verdict should be set aside, and entered for defendant. The court made the rule absolute, directing, that the plaintiff should have costs to the time of the money being paid into court, and that he should pay the defendant the subsequent costs.

If verdict for
exact sum paid
in.

But since this decision has been impeached, and in the case of *Stevenson and Yorke*, 4 T. R. 10. where, after verdict for defendant, who had paid money into court, it was moved on the above authority, that plaintiff should have his costs up to the time of paying the money into court; it was denied, and *per Buller*; though the plaintiff was intitled to the costs up to that time, if the application had been made before trial; yet the party came too late after trial. And that part of the case of *Griffiths and Williams* cannot be supported. *Kabell v. Hudson*, 4 D. & E. 10.

Upon this principle, where in twelve actions on policies of insurance against several defendants, they paid money

into court on each of them, but no costs were taxed by plaintiff, who afterwards entered into consolidation rule to be bound by such verdict in all as should be found in the first action, in which action he was nonsuited: it was held that he was not intitled to costs in any of the actions, not even up to the time of paying the money into court. *Burghall v. Horner*, 7 D. & E. 372.

If nonsuited,

If plaintiff suffers a nonsuit after payment of money into court, he is still intitled to the money paid in. *Sal.* 597. *Caf. of Pr. C. B.* 36.

Where money was paid into court to attend the event of the verdict, and plaintiff was nonsuited, it was paid back to defendant, and could not be retained in court. Subject to a new verdict. *P. R.* 253. *Frampton v. Cooke.*

But Q. Can plaintiff in such case be nonsuited? See *Jenkins v. Tucker*, 1 H. B. C. 93.

Exception as to
executors de-
fendants:

It is otherwise with executors and administrators; for if plaintiff be nonsuited, after they had paid money into court, it shall be returned to them, because they may be unacquainted with the assets of testor, and not know whether he owed plaintiff the money or not. *Anon. Caf. of Pr. in C. B.* 5.

Taking money
out of court, a
waiver of irre-
gularity.

If the plaintiff takes the money out of court, he waives every irregularity on part of defendant in paying in the same. As if it be paid in after plea pleaded, or in an action purely sounding in damages, in which properly no money can be paid into court. And if upon trial, he does not recover greater damages than the sum so paid in and received, he will be nonsuited. *Griffiths v. Williams*, 1 D. & E. 710.

Ordinary costs
of paying in
and taking out,
paid by defend-
ant.

Costs of paying money into court, and taking it out, must be paid by defendant, though the money was tendered after rule obtained to pay it in, and refused by plaintiff before it was paid in. *Cotton v. Perks*, *P. R.* 258.

Except in cases
of oppressive
action.

Where an action is kept on foot by plaintiff in an oppressive manner, and defendant has been willing to pay the debt, and has taken out summons before a judge for that purpose, and the plaintiff has refused to accept the same, the court will suffer defendant to pay the money into court, and discharge him from the payment of costs. *Johnson v. Houlditch*, *Bur.* 578. And though defendant may have paid the money into court on the usual rule, which is on payment of costs, he may afterwards move for so much of that rule to be discharged as relates to the costs, which will be granted. *Ibid.*

Costs only al-
lowed of the
counts money
paid in upon.

If a defendant pay money into court upon some of the counts only, and the plaintiff take it out, plaintiff is only intitled

intituled to the costs of those counts. For by such partial payment of money into court, defendant admits that plaintiff has a cause of action against him to a certain extent; but that he means to defend himself against the charges contained in the other counts. And the plaintiff, by taking the money out of court, precludes himself from all right to the costs upon the other counts. *Baillie v. Cazalet*, 4 D. & E. 579.

(E) Of bringing a farther Sum into Court.

(E)

If defendant has paid a sum into court, they will not afterwards give him leave to pay more money into court, if issue is joined. *Swan v. Freeman*, Bar. 282.

Whether defendant can afterwards pay more money in.

Nor if plea be pleaded, S. C. Pr. R. 263. Because it may introduce tricks to try whether plaintiff will accept less than is due.

But Q. Whether it would not be allowed on payment of costs?

Where plaintiff would not accept the money brought in and was nonsuited, and afterwards brought a new action, defendant was allowed to bring in a further sum, which, together with the former, was ordered to remain in court upon the common rule on the new cause. *Dickins v. Tallowin*, P. R. 252.

(F) Of Defendant's refusing to pay Costs, and how Plaintiff is to proceed.

(F)

If plaintiff accepts the money, and does not proceed for further damages, his attorney gets an office-copy of the rule, and obtains an appointment of the master or prothonotary, to tax the costs on the copy of the rule, and serves defendant's attorney therewith; and if, after taxation, defendant does not pay the costs, plaintiff proceeds to deliver his issue and notice of trial, as if no money had been paid in. And one shilling damages carries costs, on producing the office-copy of rule and the *allocatur*.

How if defendant does not pay costs, when plaintiff accepted money.

Plaintiff must proceed as above; for he cannot, under the rule, move for an attachment. *Scarral v. Horton*, P. R. 259. *Hand v. Dinally*, Str. 1220.

Formerly the practice was for defendant's attorney to get costs taxed, and tender plaintiff the amount; but as this was often rendered useless by plaintiff's afterwards refusing to accept the money paid in, or going for a still greater sum, a new rule of court was made, ordering plaintiff to tax

costs as above; and in default thereof, it be considered that plaintiff intends to proceed in the action, to recover a larger sum than that paid into court.

In *assumpsit*, the defendant brought 8*l.* into court, on the usual terms of paying costs to that time. The plaintiff took it out and taxed his costs, and served the defendant's attorney, and they not being paid, went on to trial, and obtained a verdict for 7*l.* 18*s.* The defendant insisted that he should have no costs for his subsequent proceedings, since it appeared that he was overpaid. But the court held, that as to the costs, it was to be considered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which case it is not usual to grant an attachment; but the plaintiff goes on, it being only a conditional rule. They said, they would make him allow upon the execution for the 8*l.* he had taken out of court, and ordered him the *poslea*, in order to tax his whole costs. *Hand v. Lady Dinely*, Str. 1220.

But proceedings of plaintiff will be stopt, upon the after-payment of all costs by defendant. *Bond v. Jope*, Cas. of Pr. C. B. 93.

SECTION VI.

Of pleading in Bar.

- (A) Of the Time of pleading.
- (B) Of pleading the General Issue.
- (C) Of pleading Specially.
- (D) Of pleading Double.

(A)

(A) Of the Time of pleading.

The time of pleading.

In B. R.

Upon all process returnable before the last return of any term, if the action be unbailable, or if bailable, and not laid in London or Middlesex, or defendant does not live within twenty miles from London, he must plead to the declaration in eight days after delivery or filing thereof. But if the action be bailable, and laid in London or Middlesex, and defendant lives within twenty miles of London, then in four days, provided

In C. B.

Upon all process returnable the 1st, 2d, or 3d return of any term, if the plaintiff declares in London or Middlesex, and defendant lives within twenty miles of London, defendant shall plead within four days after such declaration delivered, with notice to plead accordingly without any imparlance. And in case plaintiff declares in any other county, or defendant lives above twenty miles from London, in eight days. R. Trin. 8 G. 3. Provided

provided the declaration be delivered or filed, and notice thereof given four days exclusive before the end of the term, and a rule to plead be duly entered. R. T. 22 G. 3.

Provided such declaration be delivered four days exclusive before the end of the term.

This rule is now made to extend to the fourth return in Easter term. R. H. 35 G. 3.

And now by R. H. 35 G. 3. in C. B. Upon all process returnable the last return of any term, the same time for pleading is allowed as above, according as the venue and defendant's residence is, provided such declaration be filed or delivered on the day of such return, or on the day next after the same, unless such return day shall happen on a Saturday; in which case, plaintiff shall have the whole of the Monday following to file or deliver such declaration as aforesaid.

If process be returnable on or after the last return, defendant is intitled to an imparlance, of which *vide ante*, Sec. 3. tit. Imparlance.

The above rule of court, it seems, extends only to persons residing in *England*; so that where defendant, whose usual residence was in *Scotland*, was arrested while casually in *London*, it was held, that four days time to plead was sufficient; for that his residence should be deemed in *London*, where he was arrested. *Kutiff v. Gascoyne*, 4 D. & E. 553. *n*.

In K. B. the four or eight days allowed for pleading are one inclusive, and the other exclusive; but in C. B. both are inclusive. So that, in that court, if a rule to plead be given the 7th, it is out the 10th, and judgment may be signed the 11th, if demand of plea made in time.

How the days are reckoned.

If the writ be against two defendants, and both are served before the return of the writ, and one of them do not appear in the same term, he must plead as of the term when he ought to have appeared. *Smith v. Muller*, 3 D. & E. 627.

How if two defendants, and one does not appear in time.

But a plea must not be filed (if it be aailable action) before bail be perfected, as it will be a nullity; and although bail justify afterwards, it does not become a good plea, but plaintiff may sign judgment for want of a plea. *Venn v. Calvert*, 4 D. & E. 578.

No plea till bail perfected.

(B) Of pleading the General Issue.

(B)

Pleas in bar are of two sorts, general and special. The general is a direct negation of the charge in the declaration, and is called the general issue, the form of which must be

Of the general issue.

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according

according to the nature of the action, as *non assumpsit*, *nil debet*, not guilty, &c.

In B. R.

How general
issue to be
pleaded.

*Engross it on treble penny stamp
paper, and either deliver it to
plaintiff's attorney or agent, or enter
it in the general issue book, with
the clerk of the judgments. Pay 6d.*

In C. B.

*Engross it on treble penny stamp
paper, and either deliver it to
plaintiff's attorney, or file it with
prothonotary. Pay filing, 2s.*

Need not be
signed.

No general issue need have a counsel's or serjeant's signature to it; nor need any of the following pleas, which are tantamount to it.

Nor some other
pleas.

Comperuit ad diem; nul tiel record; solvit ad diem; payment of rent; bankruptcy. 6 D. & E. 496.

And it is said that in K. B. the following need not be signed: *Son assault; plene administravit; riens per descent, per minas, per dures; ne unques executor or administrator; infra etatem.* But Q. and in C. B. it seems, they must be signed. Imp. C. B. 300.

But although the above pleas need not be signed, and some of them may be tantamount to the general issue, yet they must not be entered in the general issue book, nor yet filed with the clerk of the papers, but must be delivered to the plaintiff's attorney; otherwise they will be deemed as no plea, and judgment may be signed. *Lockhart v. Macreth, 5 D. & E. 663.*

The distinction I take to be this: All *general issues*, strictly such, must be entered in the general issue book; all *special pleas*, which are such as require signature, must be filed with the clerk of the papers; but all such pleas as are not general issues, but only tantamount thereto, and which require no signature, should be delivered to plaintiff's attorney. Formerly a book was kept to enter such pleas, and it was called entering them on the book side; but that being discontinued, and clerk of papers being only in strictness authorized to take pleas that are signed, (R. E. 18 Car. 2.) they are delivered to the attorney who makes up the issue.

But if a special replication, signed by counsel, be put into such plea, it should be filed with the clerk of the papers, who is to make up the paper book, on a copy of the plea and declaration being delivered to him.

(C)

Of pleading
specially.

(C) Of pleading Specially.

When defendant pleads specially, let the plea be signed by a counsel or serjeant.

In

In B. R.

Engross the plea on treble penny stamp paper, and file it with the clerk of the papers.

No attorney is to deliver or receive any special plea to be put into the office of the clerk of the papers, or a copy of such plea, before that the same has been put in, and a copy thereof made by the clerk of the papers. *M. 2. W. & M.*

In C. B.

It may, when engrossed on treble penny stamp paper, either be delivered to plaintiff's attorney, (which is the usual way,) or filed with the prothonotary, and then plaintiff's attorney must take it out of the office.

How special plea to be pleaded.

All special pleas must have a counsel or serjeant's hand, Must be signed. except those mentioned *ante* (B); and which are deemed tantamount to the general issue.

So that *non assumpsit infra sex annos* must. *Co. Rep. 41.*

Or a general performance of covenants, *Bar. 354. Thompson v. Atkinson.*

If a plea which ought to be signed by a counsel or serjeant's hand, is not signed, plaintiff may sign judgment; but if there be two defendants, and one pleads the general issue, and the other pleads specially, and both are on the same paper, though the special plea is not signed, plaintiff cannot reject the general issue, and take judgment against both. If he does, the judgment is totally erroneous; and if execution be sued, restitution shall be awarded; but then plaintiff may in such case regularly take judgment against him who pleaded specially. *2 Lil. Reg. 299.*

Otherwise judgment.

How if two defendants plead differently.

In the King's Bench, the clerk of the papers, with whom all special pleadings are left, makes out copies thereof, signed with his name; and to whom the plaintiff's attorney must apply for a copy, in order to draw his replication thereto, unless the replication be of course, and consists in a mere denial of the plea, without alleging any new matter therein, as *nul tiel* record to a plea of judgment recovered; in which cases, the clerk of the papers draws up the replication, and delivers the paper-book to the plaintiff's attorney, with a complete issue.

Special plea must be made up by clerk of papers, &c.

But if the replication is to be special, containing any new matter which must be signed by counsel, the plaintiff's attorney takes the copy of the plea away with him, paying the clerk for it, in order to get the replication drawn, which being done, signed by counsel, and engrossed, is carried and filed with the clerk of the papers; and if further pleadings be had in the cause, the parties alternately take copies thereof from his office, and file their answer thereto until issue is joined between them.

Consequence
otherwise.

Defendant, by leave of the court, pleaded *non assumpsit* and the statute of limitations, and delivered it to the plaintiff's attorney, who made up the issue, and delivered it with notice of trial to the defendant's attorney, who paid for it; the plaintiff's attorney, finding afterwards it should have been made up with the clerk of the papers, went and paid him his fees, made up the record, and went to trial, and the court refused to set it aside, though the defendant made no defence; for *per Cur.* he was in the first fault, in not leaving the pleas in the office. *Thomson v. Tiller*, Str. 1266.

(D)

(D) Of pleading Double.

Of pleading
double.

In case defendant pleads several matters, a rule for that purpose must be drawn up and served on plaintiff's attorney when the bill is filed.

*In B. R.**In C. B.*

Of the manner
and time of
pleading double.

This is done by giving a brief to counsel, naming your pleas, which he signs of course. Pay 10s. 6d. Then carry it to the clerk of the rules with your plea, who will draw it up. Serve it on plaintiff's attorney.

In certain cases the rule is here obtained with as little trouble as in K. B. by giving a brief to a serjeant, with 10s. 6d. naming the pleas therein. Then draw up rule with secondary, and serving copy on plaintiff's attorney.

If no such rule to plead double be taken out and signed, plaintiff may, notwithstanding a double plea be delivered or filed, sign judgment. Hil. T. 1794.

In C. B.

But there are many double pleas in C. B. not allowed upon the first motion; but on which a rule nisi is only granted, and then moved again, to be made absolute.

In which cases give brief to serjeants, to move to plead the several matters therein mentioned; upon which a rule nisi is granted, and copy whereof is made out by the secondary. Serve it upon the plaintiff's attorney, and shew him the original rule. When cause is to be shewn give brief to serjeant, (having annexed an affidavit of the service of the rule, and that at the same time the original rule was shewn him,) to make the rule absolute. The plea is then signed by a serjeant, and delivered with the rule annexed. For the first motion pay half a guinea; to make it absolute, one guinea; and to sign plea half a guinea. At the same time it is generally moved for a day or two's time to plead, which is mentioned in the rule, otherwise the time, perhaps, might expire, and judgment be signed.

What double
pleas allowed in
C. B. on first
motion.

The double pleas allowed upon the first motion in C. B. are *non assumpsit* and *non assumpsit infra sex annos*, Bar. 339; *non assumpsit* and a discharge under the insolvent debtors' act, *ibid.* 343. In *trespass non cul.* and *liberum tenementum alterius*,

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ar. 339;
debtors'
numentum
alterius,

alterius, *ibid.* 336. 340. 351. 356.; *solvit ad diem* and a mutual debt, *ibid.* 340.; *non assumpsit* to the whole, and a tender, 360.; damage feasant, and under a demise to the plaintiff, Bar. 339.; damage feasant, and for rent in arrears, *ibid.* 340.; *non assumpsit*, a set off, and a tender, as of the last term, *ibid.* 353. 357. 360. 366.; *non cepit*, cattle the property of another person, not of plaintiff, and *liberum tenementum*, *ibid.* 362.; *non assumpsit* and *plene administravit* generally, *ibid.* 348.; *plene administravit* and a set off, *ibid.* 347.; *ne unques executor* and *plene administravit*, *ibid.* 355. 365.; *non est factum* and *ne unques executor*, *ibid.* 352.; *non est factum* and dures, *ibid.* 359.; not guilty, and a general release, *ibid.* 347, 348.; not guilty, and four guineas paid in satisfaction of all trespasses to such a time, *ibid.* 349.; not guilty, *son* assault, and satisfaction for all trespasses, *ibid.* 352.; not guilty, *son* assault, and *moliter manus imposuit*, *ibid.* 351, 352. 354.; not guilty, and a justification in trespass, *ibid.* 355, 356. 365.; *non cepit* and to avow the taking, *ibid.* 365.; not guilty to the whole, and a tender of amends, *ibid.* 366. Imp. C. B. 4th edit. 301.

If in vacation you apply for this rule in either court, get a judge's summons for leave to plead several matters, (naming the pleas,) who will grant an order thereon on producing a counsel or serjeant's hand to a brief for that purpose; take the judge's order to the clerk of the rules in K. B. or secondary in C. B. who will give you an order: either annex a copy thereof for plaintiff's attorney to the plea or serve him with it.

How, If in va-
cation in both
courts.

All double pleas must be signed by a counsel or serjeant.

Must be signed.

Motion for leave to plead double cannot be made till defendant has appeared. Bar. 331. *Benn v. Geary*.

When motion
may be made.

The courts will grant leave to plead double, pleading issuably and taking short notice of trial after a judge's order for time to plead given. Bar. 338. *Leighton v. Leighton*.

After judge's
order.

After payment of money into court, defendant obtained a rule to plead double, which was set aside with costs. Plaintiff, by the rule to pay money into court, is confined to the general issue, and no other plea. The motion afterwards to plead double is an imposition on the court. Bar. 339. *Buck v. Warren*.

After paying
money into
court.

Defendant may move to plead double after rule to plead is out, any time before judgment. Bar. 329. *King v. Boswell*.

After rule to
plead expired.

By the 4 Ann. c. 16. s. 4. "Any defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, with the leave of the same court, may plead

Of the origin of
pleading double.
4 Ann. c. 16.
s. 4.

"plead as many several matters as he shall think necessary for his defence;" provided that "if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in the like manner, unless the judge who tried the said issue shall certify, that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which, upon the said issue, shall be found against him."

Construction of the statute.

1st. To what actions it extends.

Upon the first part of this clause, it has been determined in both courts, that the statute does not extend to *qui tam* actions; so that in them there can be but one plea. *Law qui tam v. Crowther*, 2 Wil. 21.

Nor to any action in a penal statute. Bar. 15. 365. *Lookup v. Frederic*.

Nor to suits where the king is a party, unless for debt immediately owing on revenue, (*vide* Sect. 24.) and therefore, in *quare impedit* by the king, a rule to plead double was denied. Bar. 353. *The King v. the Archbishop of York*.

So in an information in nature of a *quo warranto*. *Rex v. Newland*, Say. 96.

In replevin, the court gave leave to plead double, viz. that plaintiff in replevin had not property, and a justification as a distress for rent. Bar. 338. *Bird v. Spinks*.

It has also been determined, that the statute of Ann does not extend to plead double matters which shall have different trials, for instance in dower, if the defendant plead "*ne unques accouple en loyal matrimonie*," and a mortgage; for the first matter shall be tried by the bishop, and the other by a jury; and the judge cannot certify, if there was no probable cause. *Harding v. Harding*, C. B. Mich. 9 Ann. Com. Rep. 148.

Discretionary power in the court.

Formerly more strict.

Now only refused if inconsistent.

This statute gives the court a discretionary power either to permit or refuse several matters to be pleaded.

And formerly the courts, particularly the Common Pleas, were very strict in giving such leave, and expected to be even satisfied of the necessity of pleading the several matters moved for. *Crozier v. Starke*, Say. 28. But of late they have relaxed in this respect, and never refuse, provided the pleas be not inconsistent, and liable to make an incongruity on the record. *Jenkins v. Edwards*, 5 D. & E. 98. Bar. 347.

Instances thereof.

Court refused to grant leave to plead *non assumpsit* generally and a tender, *Dougal v. Bowman*, 2 Blac. Rep. 723. 3 Wil. 145.; or *non est factum* and *solvit post diem*, *Fox v. Chandler*,

Candler, Blac. 905.; or *non est factum* and *solvit ad diem*, *Arnold v. Baas*, 993.; or *non assumpsit* and alienage of plaintiff, *Feron v. Ladd*, *ibid.* 1326.; or in dower, *ne unques seise* and *ne unques accouple*, *Anderson v. Anderson*, *ibid.* 1157. *Hillier v. Fletcher*, 1207.; *non assumpsit* and a release, Bar. 328.; *non assumpsit* and infancy, Bar. 363.; *solvit ad diem* and *riens per dissent*, *ibid.* 332.; *liberum tenementum* and a justification, *ibid.* 329.; *nil debet* and *nil habuit in tenementis*, the latter may be given in evidence, *ibid.* 333.; not guilty and *liberum tenementum*, *ibid.* 350.; not guilty, and that plaintiff became bankrupt, *ibid.* 360.; not guilty and a licence, Bar. 351. 364.; without affidavit, *ibid.* 357.; not guilty and a release of a particular trespass, *ibid.* 351.; though not guilty and a general release, where an affidavit was produced, was admitted. *Ibid.*

In C. B.

But not guilty and tender of amends allowed. *Martin v. Kesterton*, 2 Blac. R. 1093.

All of which cases were in C. B.

In B. R. general issue and statute of limitations allowed, Str. 678.; so tender and eviction, 496.; so *non est factum* and bankruptcy, 871.; so not guilty and the statute of limitations, 889.; so *non est factum* and no request made, 908.; so bankruptcy and *non assumpsit*, 1000.; but not guilty and a justification not allowed, 876.

In B. R.

Non assumpsit to the whole and tender to part held inconsistent. *MacLellan v. Howard*, 4 D. & E. 194.

And on same principle, in a late case to an action on bond, *non est factum* and a tender to part held bad; because if defendant succeeded on first plea, it would appear that there never existed such a bond, and yet that defendant had admitted that something was due on the very same bond, which would make an incongruity on the record. *Jenkins v. Edwards*, 5 D. & E. 98.

Motion to set plea aside for inconsistency, defendant having pleaded *non est factum*, *solvit ad diem*, and *solvit post diem* after judge's order; some of the above cases were cited in C. B. and also *Jenkins* and *Edwards* in B. R. per Buller, take nothing by the motion; the above cases are in C. B.; but in this court it is otherwise. *Anon.*

As no affidavit is required in order to plead double, and the court does not go into the materiality of the pleas upon motion to plead several matters, and as defendant may plead as many pleas as he thinks fit, if no two of them are inconsistent, it might frequently happen that defendants would fill the records with a multiplicity of pleas not essential to their defence, and if they obtained a verdict upon

3d, Of the certificate given by the statute.

As to costs of
issues found
against defend-
ant.

When certifi-
cate to be made.

one of them, plaintiff would be saddled with the costs of all; to prevent which, by the statute of Ann it is ordered, that the defendant shall himself pay the costs of all such issues as are found against him, unless the judge will certify, that there was probable cause to plead such matter.

The certificate upon this statute may be made after the trial. 2 D. & E. 237. 393.

For further information in this respect, see *post*. Vol. II. Chapter on Costs.

SECTION VII.

Of the Rule to plead.

So careful is the law to prevent plaintiff from taking any undue advantage of defendant, by obtaining judgment against him unawares, that it not only allows a certain time to plead to the declaration, and obliges the plaintiff to give due notice thereof, but further it compels him to serve the defendant with a rule to plead; and if defendant still neglects so to do, plaintiff must then make a formal demand in writing of a plea, and afterwards search the office to see if one be put in, before he can sign judgment; so that there are no less than three regular notices or warnings given to defendant for him to defend himself against plaintiff's charge or demand.

Having already considered the declaration and the notice thereof, which is the first warning given to defendant to plead thereto, within the time limited by the rules of the court, as before mentioned, it is only necessary further to treat of the rule to plead, demanding a plea, and searching for a plea, and of signing judgment for want thereof.

Of the form of
rule to plead.

The rule to plead is made out on a common piece of unstamped paper thus:

In B. R. or C. B.

A. B. against C. D.

Rule to plead.

1st March 1798.

T. S. Attorney.

How served.

Take it in K. B. to clerk of the rules, in C. B. to the secondary, who enters it in a book kept for that purpose; pay 1s. 10d. The rule expires in four days inclusive.

How the time
reckoned.

Sunday, or any holiday, is reckoned (except it happens to be the last day); or if it be given on the Purification, or on a Sunday, it is no day. Str. 86. Anon.

It may be given any time in term, or within four days after.

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In the case of *Oxley v. Bridge*, Do. 67. it was held, that on a rule to plead by a particular day, that day is construed to continue till the office open next morning, and that defendant would be regular, if he complied with the rule before that time. But very shortly afterwards, in the case of *Hafelov and Ansell*, Do. 197. it was adjudged, upon the report of the Master, to be the practice, that on a rule to plead, &c. in four days, although it is a common indulgence to allow defendant till the morning of the fifth, yet it is but an indulgence; and if defendant delays till that time, plaintiff may sign judgment; which was since allowed to be the practice, in *Thomson v. Ryall*, 4 D. & E. 195.

If four terms are elapsed after declaration delivered, defendant must have a whole term's notice to plead, unless the cause has been stayed by injunction or privilege; in which case, no proceedings having been had in this cause for above a year, it becomes necessary for plaintiff to give a term's notice of proceeding; two days before Hilary term, plaintiff gave notice of his intention to proceed; on the 14th February, two days after Hilary term, the rule to plead was served; and on the 18th April, in the course of the same vacation, the plaintiff signed judgment, as of Hilary term, for want of a plea; which the court held regular; nor did they look upon the circumstance of the judgment being as of Hilary term of any consequence; for the rule requiring a term's notice, when no proceedings have been had in the cause, was only a rule of court, they said, introduced for the benefit of the party, the full benefit of which the defendant had had in this instance; nor would the judgment appear irregular on the record, though signed as of Hilary term. *Milbourne v. Nixon* and others, 2 D. & E. 40.

How, if four terms are elapsed.

Where time to plead has been given, by rule of court or judge's order, plaintiff may sign judgment at expiration thereof for want of plea, without giving any rule to plead; because, by obtaining such time, he admits himself to be in court. *Towers v. Powell*, 1 H. Bl. 88. *Storkie v. Wilkes*, Imp. K. B. 242.

Where rule to plead not necessary.

So the defendant may dispense with a rule to plead, by pleading either in bar or abatement. *Brandon v. Payne*, 1 D. & E. 690.

It may be dispensed with.

Although such plea be a mere nullity and as no plea. *Lockhart v. Macreth*, 5 D. & E. 663.

Otherwise, generally speaking, a rule to plead is necessary; and even if a rule has been before given, if judgment was not signed as of that term in which it expired, a new rule

Where a new rule necessary.

rule should be given to warrant the judgment, signed as of that term in which it is so signed. Gilb. Rep. 318. Imp. K. B. 244.

Where not.

But this is liable to some exceptions; for where a rule to plead has been given, and defendant obtains an order, or is bound by rule of court to plead by a certain time, as for instance, the first or second day of next term, plaintiff may sign judgment on default of defendant's pleading without giving a new rule. Rep. & Cas. of Prac. C. P. 67. 141. *Vide* Imp. K. B. 203. *cont.*

So where plaintiff has given a rule to plead, and has been delayed from signing judgment by an injunction out of chancery, after the injunction has been dissolved, he may sign judgment without giving a new rule. Bar. 238. *Theedam v. Jackson.*

If a rule to plead be entered the same term an amendment is made, though before such amendment, it is sufficient; otherwise a new rule must be entered. Non rule, 10 G. 2. 2 Salk. 517.

When rule
should be
served.

Rule to plead must not be served before notice of declaration, as it would be void. *Grey v. Saunders*, Bar. 248. *Brandon v. Payne*, 1 D. & E. 696.

But it may be served immediately after, whether declaration be in chief or *de bene esse*, even on the same day after notice or delivery thereof.

If a declaration is delivered *de bene esse*, a rule to plead may be given the same day before defendant appears: but if plaintiff demands a plea, in case the process is bailable, before bail is filed, it is a waiver of the exception to the bail.

Clerk of rules will accept a rule to plead on the effoin day, but it cannot be entered until the first day of term. Imp. B. R. 244.

How if defend-
ant dies before
time expires.

Where defendant dies before the time for pleading expires, or after the rule to plead is out, but before the expiration of the time given him by a judge's order, the suit abates, and plaintiff cannot sign interlocutory judgment and sue out a *sci. fa.* *Wallop v. Irwin*, B. R. 1 Wil. 315.

SECTION VIII.

Of demanding a Plea.

Of demanding a
plea.

When defendant has put in bail or appeared in time, a plea must be demanded in writing of defendant's attorney, before plaintiff can sign judgment; and this, although no-

tice

tice to plead be indorsed on the declaration. *Nott v. Oldfield*, 1 Wil. 134. *Bar. 276. Eames v. Jew.*

In B. R. a *latitat* was returnable 22d of April, being the second return, and a declaration was left in the office the 24th *de bene esse*; on the 26th defendant put in special bail, and gave notice thereof: and a rule to plead being entered in the office by the plaintiff's attorney, when that was out, he signed judgment without demanding a plea: *et per Cur.* A plea must be demanded in writing, wherever a rule to plead is given, and defendant files bail in time, as he has done here; and accordingly judgment was set aside for irregularity, with costs. *Ibid.* 1 Wil. 134.

It must be in writing.

The demand is in this form, in B. R. or C. B.

A. against B.

The plaintiff demands a plea in this cause, otherwise judgment.

Your's, &c.

H. Attorney for plaintiff.

Mr. C. D. attorney for defendant.

And to be delivered to or left with defendant's attorney, or to the agent in town.

Form of demand.

It is said that it will not do on the back of the declaration, for it must be after the delivery of declaration, and even after rule to plead has been given. *Per Master Benton*, Imp. K. B. 248.

How it must be made.

But in the case of the churchwardens of *Edmonton v. Osborn*, 6 D. & E. 689. it was held, that a demand of a plea might be made *at the time* of delivering the declaration: the fact was, in that case, a demand of a plea written on a separate piece of paper, annexed to the declaration, was given at the time of delivery of declaration, and held good. This, however, is doubted in Imp. K. B. 753. 6 edit. who says, that both Master Benton and Foster agree that plaintiff is not in a condition to demand a plea, till rule to plead is entered; and that the practice of the Common Pleas is so.— Indeed, I am inclined to be of the same opinion; especially as I remember the case of the churchwardens of *Edmonton v. Osborn* was determined by a sudden reference to the Master in court, in the hurry of business, on the last day of the term.

In B. R. such demand must be made 24 hours before judgment can be signed by default; but at any time after the 24 hours from the time of the demand, judgment may be signed. *Dyche v. Burgoyne*, 1 D. & E. 454.

When.

But not before time for pleading may have expired. *Bowles v. Edwards*, 4 D. & E. 118.

If

If a plea be demanded on a Saturday, the defendant has 24 hours to plead after demand, exclusive of Sunday. *Salomons v. Freeman*, 4 D. & E. 557.

And in C. B. if the rule to plead be out before demand made, judgment must not be signed within 24 hours after. *Wooden v. Boynton*, 1 Bl. 50.

The defendant must be in court before the plea is demanded.

A demand of a plea, therefore, before the defendant has appeared, or plaintiff filed common bail for him, is a mere nullity; nor will filing common bail afterwards cure the irregularity. *Cook v. Raven*, 1 D. & E. 636. *Venn v. Calvert*, 4 D. & E. 578.

So that if plaintiff signs judgment for want of a plea on such an irregular demand, it will be set aside. *Ibid.*

But where defendant's attorney undertook to file common bail, and neglected so to do, and afterwards plaintiff demanded a plea, and signed judgment for want of one, although defendant was not in fact in court, and although, on the authority of *Cook v. Raven*, he moved to set aside the judgment, yet the court would not listen to the objection, the defendant's attorney having broken his engagement. *Giles v. Hutchins*, K. B. M. T. 1794.

When no occasion for demand.

Where declaration is filed *de bene esse*, and notice thereof given, if defendant does not file common bail in time, and plaintiff files it for him according to the statute, there is no need to demand plea before signing judgment. Mich. 10 G. 2.

So if defendant be in custody of the sheriff, no demand of a plea is necessary. *Rose v. Christfield*, 1 D. & E. 591.

Nor if pending the suit defendant gets himself removed into the custody of the court, unless he gives notice thereof to plaintiff. *Wilkinson v. Brown*, 6 D. & E. 524. But see Vol. II. Proceedings against Prisoners.

When it is a waiver of bail.

The demand of a plea is a waiver of bail; care should be taken, therefore, that bail is put in and justified before plea demanded. Imp. K. B. 248.

SECTION IX.

Of searching for Plea, and signing Judgment for Want thereof.

Of searching for plea, &c.

Search for plea in B. R. at the clerk of the papers in the book there under plaintiff's name; if not to be found there, search with the clerk of the judgments, who keeps the general

neral issue book : in C. B. search at the prothonotary's office in the book there, by defendant's name. When to search.

If no plea to be found, and none delivered in due time, sign judgment by default. If none found.

If defendant does not plead within time, a rule to plead having been given and expired, and a demand in writing of a plea having been made, the plaintiff may sign judgment. When judgment may be signed.

Tr. 5 & 6 G. 2.

But if plaintiff delays signing judgment, and defendant, after the rules are out, and before judgment signed, puts in his plea, such plea must be accepted, nor can plaintiff then enter his judgment; if he does, it will, on motion, be set aside for irregularity. *Minns v. Baxter*, 1 D. & E. 17. If not signed, whether plea may be put in.

But it seems now that plaintiff, although he has not signed judgment, may refuse to accept any plea, if it be afterwards offered, as he may to receive the paper-book under the like circumstances. *Thompson v. Ryall*, 4 D. & E. 196.

Until of late, it was the general opinion of practisers, that when either the plaintiff or defendant were called upon to speed the proceedings of a cause by rule to plead, reply, &c. it was sufficient to do the act required at any time before the adverse party availed himself of the non-performance; which practice, we believe, never received the *fat* of authority from the court, but arose from the indulgence of one clerk in court to another, whilst the proceedings were carried on by them as agents for the attorneys at large, and from thence was continued down, until some late determinations. This indulgence, however, seems not to have extended to the returning of paper-books, as appears by the resolutions in matters of practice agreed upon by Mr. Secondary Livesay and the ancient clerks in the year 1669, and which was certified as the practice by the late Master Benton to Lord Mansfield, upon arguing the case of *Hafeler v. Ansell*, Doug. 197. It is not possible to assign any reason for this distinction; and although there are contradictory cases, yet now the case of *Hafeler v. Ansell*, and *Thompson v. Ryall*, above cited, wherein the several cases alluded to were referred to, have established the practice to be, that if the party upon whom the rule is made, do not perform what is thereby required within the time given by the rule, the adverse party is not bound to accept a performance of the act afterwards, but may sign judgment. Notes on R. T. 1 G. 2. K. B. edit. 1795.

SECTION X.

Of obtaining Time to plead.

- (A) How to be done, and in what Cases granted.
- (B) When Summons to be taken out, and of the Effect thereof.
- (C) Of the Terms on which further Time is granted.
- (D) What are issuable Pleas within a Judge's Order.
- (E) Of the Consequences of Defendant not pleading a proper Plea according to the Order.
- (F) Of signing Judgment at the Expiration of the Order.

(A) (A) How to be done, and in what Cases granted.

How to procure time.

If the defendant cannot be ready to plead by the time the rule expires, he may apply to a judge (for a summons for further time, serve a copy thereof on plaintiff's attorney; and upon attending the judge, he will make an order agreeable to the circumstances of the case; which order is also to be served as the summons was.

This application must be made at least the day previous to the expiration of the time to plead.

Amongst fair practisers, a consent is generally procured.

The length of time given to defendant to plead is entirely in the discretion of the judge; and such order is usually granted upon terms so as not to delay the plaintiff.

Of the time usually granted.

Where the cause of action is local, and cannot be tried but at the assizes, the length of time to be granted will depend entirely on the interval there is between the application and the commission day of the circuit; for the judge will not extend the order so far as to hinder plaintiff from trying his cause at the then next assizes, if he choose it.

If either of the parties live in the country, and the cause of action is transitory, and to be tried in town, the same doctrine is held as in town causes, allowing for the difference of time required in notices, in order to join issue in them.

Further

(A) Sec. X.] OF OBTAINING TIME TO PLEAD.

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Further time may be obtained by a second summons, and so on, provided no delay is occasioned to the plaintiff.

(B) When Summons to be taken out, and of the Effects thereof.

(B)

A summons for time to plead ought not to be taken out after the rule to plead is out; and if such summons be taken out and served, it is no stay of proceedings. Bar. 254. *Orwell v. Duett*, Caf. of Pr. C. B. 137. 142.

When summons to be taken out, and

If the defendant takes out a judge's summons for time to plead, the plaintiff cannot sign judgment till the summons is discharged, Bar. 225. Rep. & Caf. of P. R. C. B. 144. *Brown v. Godfrey*: but this is in case it be returnable before judgment be regularly signed.

of the effect of a judge's summons as to staying proceedings.

For a judge's summons is held to be no proceeding; it stays nothing, *unless it be returnable* before the judgment be regularly signed; and if judgment be regularly signed before the summons for time to plead is returnable, the court will not set it aside, especially if defendant has no merits. *Calze v. Ld. Littleton*, 2 Blac. 954. But see *contra*, Bar. 265. *Smithson v. Broughton*.

(C) Of the Terms on which it is granted.

(C)

The terms usually contained in a judge's order on summonses for time to plead are these, "pleading *issuably*, re-joining *gratis*, taking short notice of trial or inquiry (if necessary) within the term;" but the judge will not hold the defendant to all these terms and conditions, on granting the first order, unless the state of the cause require it, or the party summoned before him ask it.

Of the terms on which time is usually granted.

If in a town cause (that is, a cause which is to be tried at the sittings in London or Westminster) the defendant applies for time to plead, the judge will not grant any orders, but upon condition that his attorney undertakes to plead an *issuable* plea; and pleading *issuably* within the order, means pleading such an issue as the plaintiff might go to trial upon. *Foster v. Snow*, Burr. 782.

When the defendant is an executor or administrator, the order will be for him not to plead any judgment, since the time for pleading was out, lest he should confess a judgment in the mean while, and plead it in bar of defendant's demand. 8 Mod. 308. Imp. K. B. 245.

(D)

(D) What are issuable Pleas within a Judge's Order.

What an issuable plea or not within a judge's order.

Abatement.

An issuable plea is a plea in chief, upon which plaintiff may take issue, Bar. 263. and go to trial upon.

A plea in abatement is not such a plea, because it tends to delay the plaintiff. *Kilwick v. Maidman*, Burr. 59. *Wagstaffe v. Long*, Bar. 263.

Coverture.

Proceedings had been stayed on the common terms of defendant pleading issuably, &c. she had then an attorney on record, and now comes and pleads *in propria persona*, "that Ann the wife of David Thomas, who is sued by the name of Ann Thomas, did not undertake," &c.: it was insisted that this was an abuse of the rule, tending in effect to introduce a plea of coverture; and it was moved to set aside the plea, and that plaintiff might have judgment. The court set aside the plea, and directed her to plead the general issue *non assumpsit* by attorney. *Conwell v. Thomas*, Blac. 724.

Tender.

But a plea of tender is an issuable plea in B. R. *Ibid.* And now determined to be so in C. B. *Noone v. Smith*, C. B. T. R. 369.

Though it used to be held otherwise. *Caf. Prac. C. B.* 134. Bar. 337. *Davenhill v. Barritt*.

Plea of stat.
23 Hen. 6.

So to an action on a bail-bond, a plea of the statute 23 Hen. 6. c. 10. that the bond was taken for ease and favour, is an issuable plea within such order. *Dearden v. Holdon*, Burr. R. 605.

Performance.

A general performance is not an issuable plea within a judge's order in an action of covenant. Bar. 354. *Thomson v. Atkinson*.

General issue
and statute of
limitations.

The defendant may plead the general issue, and statute of limitations, after an order to plead issuably in both courts. *Rucker and another v. Harnay*, 3 D. & E. 124. Though not long before decided otherwise. *Stadholme v. Hodgson*, 2 D. & E. 390.

Nil debet and *nul tiel record* to an action on a judgment held issuable pleas by the Master: you may go to trial on the first, and give the day to produce the record the first day of the next term in the replication. Imp. K. B. 245.

Judgment recovered.

A judgment in C. B. no issuable plea in B. R. (when false in fact); Blac. R. 376. *Heron v. Heron*; and the falsity of it may be proved by affidavit, if attempt is made to set judgment aside.

So in C. B. a plea of recovery in B. R. ordered to be set aside, and defendant to pay costs of the application. *Cave v. Aaron*, 3 Wil. 33.

Though

Though the court were not so strongly inclined against such plea in *Lowfield v. Jackson*, 2 Wil. 117.

Defendant having obtained an order for time to plead pleading an issuable plea, &c. pleaded in bar to plaintiff's action, (which was upon simple contract,) a judgment confessed upon a bond since the order for time to plead made; plaintiff moved to set aside the plea, but the court were of opinion, that as there was no particular restraint in the order, and as the bond (whereupon the judgment was confessed) might have been pleaded in bar to this action, the plea must stand. *Hughes v. Pellet*, Bar. 330.

Judgment confessed since the order, good, If not bound in terms not to plead it.

The court of C. B. held a demurrer not to be an issuable rejoinder within the judge's order. *Nesbet v. Farmer*, Bar. 168. *Maurice v. Engier*, Ib. 271.

Demurrer.

But that it might appear whether a demurrer was necessary or not, the court ordered plaintiff to join in demurrer, and enlarged the rule to set aside the demurrer till after argument.

But it seems now in C. B. that a demurrer to the merits is an issuable plea within the meaning of an order for time to plead, *Wright v. Ruffel*, 2 Blac. R. 923.; but a frivolous demurrer would not be. *Stonehouse v. Vessel*, Say. 88.

The defendant obtained time to plead on the terms of pleading an issuable plea, rejoining *gratis*, and taking short notice of trial. The action was on a bond conditioned to surrender a copyhold at the request and costs of plaintiff; plea, that the plaintiff never requested; replication a request, and plaintiff then made up the issue, with a rejoinder to the country, which the defendant on delivery struck out, and demurred so near to the assizes, that the plaintiff, expecting a trial, had the record made up, and actually tried the cause before he heard of the demurrer; and now, on motion, the court set aside the verdict: for the construction of these terms put upon the defendant, when he asks time to plead, is not to oblige him in all events to join issue to the country, but only where the replication offers a fair issue, and affords no reasonable cause of demurrer; now here the replication not shewing any tender of a surrender, does give such a colour of objection as will warrant what the defendant hath done. *Dewey v. Sopp*, Str. 1185. *Vide* Say. 88.

Good demurrer is an issuable plea:

The defendant having obtained a judge's order upon the terms, amongst others, of pleading an issuable plea, put in a sham demurrer, and the plaintiff's attorney supposing this not to be within the order, signed judgment; upon which the defendant obtained a rule to shew cause why this judgment

Sham demurrer is not.

ment should not be set aside; and on shewing cause, the plaintiff's counsel prayed, that this rule might be discharged, with costs.—*Per Cur.* There is a distinction between a real and fair demurrer and a sham one; the former is an issuable plea within the meaning of a judge's order; the latter is not, only an evasion of it: and the rule was discharged with costs. *Gray v. Ashton*, 4 Burr. 1788.

(E) (E) Of the Consequence of Defendant not pleading agreeable to the Judge's Order.

Of the consequence of defendant pleading a plea not within the order.

Judgment may be signed.

If the defendant presumes, in breach of his undertaking, to plead a dilatory plea, or such an one as plaintiff cannot argue the law or try the fact on, the plaintiff may sign judgment as if no plea had been pleaded, and give notice of executing a writ of inquiry.

So if he plead several pleas, one of which is not issuable, though the others are so, plaintiff may sign judgment for want of a plea. *Waterfall v. Glode*, 3 D. & E. 305.

Defendant, by leave, made two avowries; plaintiff obtained a judge's order for time to plead, pleading issuably, and taking notice of trial for the sitting after term, and within time demurred to the first, and pleaded in bar to the last. Defendant signed a *non pros*, for want of plaintiff's pleading issuably to both avowries, which the court held regular; but upon payment of costs, pleading issuably to both, and taking notice of trial within term, the *non pros* was set aside. Bar. 314. *Sutton v. Waddilove*.

But to warrant plaintiff signing judgment, the plea should appear on the face of it to be a dilatory plea; for if it goes to the substance of the action, however informal it may be drawn, or however bad in itself, plaintiff cannot treat it as a nullity and sign judgment, but should demur. *Tbellupor v. Smith*, 5 D. & E. 152. See also *Cappin v. Carter*, 1 D. & E. 462.

(F) (F) Of signing Judgment at the Expiration of the Order.

Of signing judgment at expiration of the order.

How the time reckoned.

If a judge gives an order for a month's time to plead to defendant, it is a lunar month, or four weeks; for a month in law is always a lunar month, except in *quare impedit*. In all temporal cases it is a lunar month; in ecclesiastical, a solar. *Talbot v. Linsfield*, Blac. 450. *Tullet v. Linsfield*, Barr. R. 1455.

The

The time to plead under a judge's order is reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires. So that an order for a week's time to plead obtained on a Saturday, expires on the morning of the following Saturday: and in C. B. plaintiff may sign judgment at the opening of the office in the afternoon of that day. *Kay v. Whitehead*, 2 H. Bl. 35.

But in a note to that case it is said, that in B. R. plaintiff cannot sign judgment till after 24 hours have passed from that time.

The defendant had an order by consent from a judge for eight days' time to plead, and at the expiration of the eight days, the plaintiff signed judgment without giving a rule to plead; *et per Cur.* the judgment is regular. Rules are only to give the parties notice when they are expected to plead; here the defendant's praying time to plead, excludes any presumption that the plaintiff has not given him such notice. *Strankie v. Wilkes*, Mich. 7 G. 2, in B. R. In C. B: *Towers v. Powell*, 1 H. Bl. 88.

Rule to plead not necessary where time has been obtained.

SECTION XI.

Of moving to abide by Plea.

It is a common practice, in order to gain time and get over a term, for defendant to protract plaintiff's proceedings as much as possible by special pleadings, and afterwards when the issue or paper-book is delivered, to strike them out and plead the general issue, or to strike out the *similiter* in the replication and add a demurrer: to prevent which, it is customary for plaintiff, when he suspects defendant's plea to be a sham one, to apply for a rule to compel defendant to abide by his plea pleaded, or to plead immediately some other which he will abide by, which is done in the following manner:

Use thereof

If you wish to get rule for defendant to plead another plea on the morrow, draw up brief for counsel to move for defendant to abide by his plea already pleaded, or plead such other as he will abide by; fee 10s. 6d.; carry it to the clerk of the rules, who will draw up rule accordingly; pay 5s.; but if you want him to plead instant, it is a motion in court.

How to be done in term.

When the rule is obtained, leave copy thereof at defendant's attorney's house.

This rule may be procured immediately after defendant has pleaded, and served the very same evening.

In vacation.

In vacation a judge at chambers may make an order, that the defendant shall plead such a plea as he will stand by. Foster v. Snow, Burr. 782.

The form of the rule is as follows:

Tuesday next after the morrow of St. Martin, in the 36th year of King George the Third:

A. } *It is ordered, that the defendant, upon notice of this rule to be*
v. } *given to the attorney, shall abide by his plea, or plead such other*
B. } *plea peremptorily on the morrow as shall not be waived, other-*
wise let judgment be entered for the plain:iff upon the motion of Mr. —

By the Court.

How, if orders
not obeyed.

If he does not plead a new plea, proceed by making up the paper-book.

When to plead
instante.

The court will order defendant to plead *instante* towards the end of the term, when otherwise there might not be sufficient time to give notice of trial.

In which case he must plead within 24 hours after rule served. *Price v. Hodgson*, E. 35 G. 3. Imp. K. B. 309.

But the time allowed by the common rule to plead should be expired. So also on frivolous demurrers. N. on R. 5 & 6 Geo. 2. Imp. B. R. 309.

Of the costs.

In court of B. R. costs of this motion are allowed, whether defendant abides by his plea or not.

If no new plea,
the first stands.

The defendant pleaded a sham plea, and plaintiff obtained a common rule that the defendant should plead peremptorily on the morrow, and that such plea should not be waived, and served it on the defendant's attorney, who taking no notice of it, the plaintiff, after the day was out, signed judgment, which the court, on the Master's report, held to be irregular; the first plea standing, if the defendant did not lay hold of the opportunity given him of altering it, whereby the plaintiff has the benefit of his motion. *Webb v. Holt*, Str. 1234.

What to be
pleaded after
such rule or or-
der.

After a rule to abide by a special plea, (as where defendant had pleaded judgment recovered,) or plead such other plea as defendant will abide by, he can only plead the general issue; and if he should plead any other special plea, or any double plea, as the general issue and plea of set-off, it will be deemed as no plea, and plaintiff may sign judgment. 1 D. & E. 693. *Hare v. Lloyd*; and in notes, *Prout v. Dewar*.

But he may, after such rule, plead the general issue, and give a notice of set-off. *Cockran v. Robertson*, Ibid.

SECTION XII.

Of Replying, Rejoining, &c.

In B. R.

Get a rule from the Master, take same to the clerk of the rules, who will enter it on the back of your last proceeding, viz. plea, replication, &c. pay 1s. 10d. serve copy thereof on common paper on plaintiff's attorney, naming the cause thus:

A. against B.

Monday next after, &c. to reply—entered.

If the replication, &c. is not filed or delivered, as the case may be, (if special, at the clerk of the papers; if to a general plea, to the attorney,) then when rule is expired, sign judgment of non pros.

No demand is necessary in this court, as the service of the rule is held a demand of itself.

In C. B.

Give a rule for that purpose, thus: How to reply, rejoin, &c.

A. against B.

Rule to reply.

T. S. Attorney.

Take it to secondary's office, pay 1s. 10d. then make a demand thus:

In C. B.

A. v. B. The defendant demands a replication in this cause by yours.

T. S. attorney for defendant.

When the time is expired and replication not delivered, search for it at prothonotary's, and if not filed there, sign judgment of non pros.

There is no precise time fixed for replying, rejoining, sur-rejoining, rebutting, &c.; but in all these cases, if the party who is to do the act is served with a copy of the rule for that purpose, he must reply, &c. within *four days exclusive* after the service of copy of such rule; and if he does not, judgment may be signed; but if judgment be signed, or other proceedings had before that time, the same, on application to the court, will be set aside; and Sunday, or any holiday on which the court doth not sit, not being the last of those four days, is to be reckoned a day within those rules.

Of the rule to reply, and when judgment may be signed.

Rule to reply served on the 5th, judgment cannot be signed till the 10th.

If a cause has continued four terms without any proceedings, each party shall have a whole term's notice to reply, rejoin, &c. (unless the cause has been stayed by injunction or privilege); which notice must be given before the effoin day. 2 Str. 1164.

How if four terms have elapsed.

The notice should be, that you intend to proceed by giving a rule to reply, &c.; the rule is to be given by the Master the day after the term is expired, and to be entered with the clerk of rules before service. Imp. K. B. 312.

Rule to reply, rejoin, &c. may be given at any time in term, or within 16 days after term, except Easter term, and then in C. B. in 10 days.

When rule to be served.

If

How, if time wanted.

If time be wanted to reply, &c. apply for a judge's summons, and draw up order as in other cases. See *ante*, Sec. 10.

No rule necessary when plaintiff adds *similiter* and it is not struck out.

Whenever the plaintiff adds the *similiter* to the end of his replication, and delivers the issue, with notice of trial, to defendant's attorney, who receives the same, and does not strike it out and demur, there is no occasion for plaintiff to give a rule to rejoin. *Boone v. Eyre*, 1 H. Bl. 254.

When plaintiff may add *similiter*.

In all cases, when defendant's plea concludes to the country, plaintiff may add *similiter*, and deliver issue with notice of trial.

If no rejoinder, plaintiff may enter judgment as for want of a plea.

If defendant do not rejoin, it is considered as an abandonment of the plea; plaintiff, therefore, may strike out all the previous pleadings, and enter judgment as for want of a plea, not for want of a rejoinder. *Petrie v. Fitzroy*, 5 D. & E. 152.

Rejoinder, &c. may be refused after rule out.

On a rule to plead, reply, &c. in four days, if the party on whom the rule is made delay complying with it till the morning of the 5th, it should seem that the adverse party may refuse to receive it and sign judgment. *Thompson v. Ryall*, 4 D. & E. 195.

It is true, as observed in Imp. K. B. 312. this case was on a paper-book not a rule to reply; but I think the principle applies to both. See fuller observations hereon *ante*, Sec. 9.

SECTION XIII.

Of the Plea of Tender.

- (A) What constitutes a good Tender.
- (B) In what Actions a Tender may be pleaded.
- (C) When and how to be pleaded, and of the Consequences of such Plea to the Parties in the Suit.
- (D) How Defendant may avail himself of a Tender, if made before Action, though by the Teste of Writ, or Memorandum of Bill, it appears since.

(A) (A) What constitutes a good Tender.

To whom tender to be made.

A tender may be made to any person in whom, either as party or privy, the right to the thing tendered is, as a tender to an executor, even before probate, if he afterwards proves the

the will, or to an assignee of a bond. But it is said, that tender of amends to a bailiff, who has distrained beasts damage feasant, is not good, because, as a mere servant, he has no power to deliver the beasts. But Q. 3 Blac. Abr. 10.

Payment of a debt to the plaintiff's attorney is good payment, even after he was privately changed, and plaintiff had employed another attorney, because he ought not to have been changed without leave of the court, *Powell v. Little*, 1 Blac. 8. : though payment to the attorney is good; payment to his agent is not so. *Yates v. Frackleton*, Do. 624. Nor to the attorney's clerk, who shewed no authority but his master's order to demand it. Esp. N. P. 115.

But a tender to an attorney can only be good under particular circumstances, as where the attorney is authorized to settle the business, and writes to defendant previous to suing out writ, warning him of the action, unless he pays him the money, or the like; for a tender must be made before the writ is sued out; and though plaintiff may have generally employed any one as attorney, yet it does not follow that he may give him authority in that particular action.

In order to constitute a legal tender, the money should actually be shewn to the person to whom it is tendered; but this form may be dispensed with by the party to whom tender is made. How to be made.

As where defendant said, he had the money in his pocket, and plaintiff answered, "You need not give yourself the trouble of offering it, for I will not take it." *Douglas v. Patrick*, 3 D. & E. 684.

Nor is it the business of defendant to count the money; if he tenders it in a bag, or untold, it is good; it is receiver's business to tell it. 5 Co. 115. Bull. Ni. Pri. 155.

So if he tenders a larger sum, and asks change, unless objection made at the time on that account. *Black v. Smith*, Peake's Cas. 88.

It is generally laid down, that a tender in bank notes is not a good tender, though rendered so, if defendant offers to get cash for the notes, *Noyes v. Price*, Sitt. 16 G. 3. 2 Eq. Cas. Ab. 319. : but if the question were to come directly before the court, (which it never yet has,) I conceive they would be inclined to consider bank notes in such a case as money; especially during the continuance of the late acts of parliament, restraining the bank from paying in specie. See *Miller v. Race*, Burr. 459. What a good tender.

At all events, if bank notes are offered, and no objection made on that account, it is a good tender. *Wright v. Reed*, 3 D. & E. 554.

A receipt

A receipt cannot be insisted upon by the party tendering the money. *Cole v. Blake*, Peake 179.

(B) (B) In what Actions a Tender may be pleaded.

How in case of joint demands.

If A., B., and C. have a joint demand, and C. has a separate demand on D., and D. offers A. to pay him both the debts, which A. refuses, without objecting to the form of tender, on account of his being only entitled to the joint demand, D. may plead this tender in bar of an action of the joint demand, and should state it as a tender to A., B., and C. *Douglas v. Price*, 3 D. & E. 684.

To a quantum meruit.

It was formerly held, that a tender could not be pleaded to a quantum meruit, because the demand was uncertain, per Holt. *Giles v. Hart*, 1d. Raym. 255.

But since determined otherwise on demurrer. *Johnson v. Lancaster*, Str. 576.

Stat. 4 Ann. in debt on bond.

By stat. 4 & 5 Ann. c. 16. s. 12. the plea of *solvit post diem* is given to an action on a bond; but a tender and refusal of principal and interest at a subsequent day cannot be pleaded, as not being within the equity of the statute; for such construction would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice. *Underhill v. Matthews*, C. B. Bull. Ni. Pri. 171.

Stat. 21 Jac. in trespass.

Tender of amends before action brought, may be pleaded to involuntary trespasses, 21 Jac. 1. c. 16.; but not to voluntary ones, as taking away goods. *Baile v. Vivas*, Str. 549.

In replevin for damage feasant.

To an avowry for damage feasant in replevin, tender must be pleaded to have been made before impounding; for it is not within the statute of James I. which goes only to trespass, where tender of amends may be pleaded to have been made at any time before action brought. Lutw. 1596.

If a man avow taking the cattle damage feasant, and the plaintiff pleads tender of amends and a refusal, he shall recover, on a verdict for him, damages for the detaining and not for the taking, because the taking was lawful; but if the tender were before the taking, the taking is tortious: if after impounding, neither the taking nor detaining is tortious; and after the avowant has had return irreplevisable, yet if the plaintiff make sufficient tender, he may have detinue for the detainer after. Sal. 584. 8 Co. 147. Bull. Ni. Pri. 60.

To an avowry for rent, the plaintiff may plead a tender and refusal without bringing the money into court; because if the distress were not rightfully taken, the defendant must.

must answer the plaintiff his damages. Bull. Ni. Pri. 60. Sal. 584.

But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premises, and then such plea is given by 11 Geo. 2. c. 19. s. 9.

For rent.

Where defendant came into possession of goods wrongfully, no tender is necessary of freight, &c. paid by him, in order to enable plaintiff to maintain his action. *Lempriere v. Pasley*, 2 D. & E. 485.

In trover.

Sometimes particular statutes authorize a tender of amends, where otherwise it would not have been allowable; as 11 G. 2. c. 19. s. 20. tender may be made for any unlawful act done by a person who has distrained for rent justly due.

Stat. 11 G. 2.

So 17 Geo. 2. c. 38. s. 10. in distraining for money justly due for relief of the poor.

17 G. 2.

So 24 Geo. 2. c. 44. s. 24. in all actions brought against justices for any thing done in execution of their office.

24 G. 2.

But the statute only means actions of tort. *Filtbam v. Terry*, East. 13 Geo. 2. B. R.

A justice having pleaded tender of amends according to the above act, the plaintiff obtained a rule for the defendant to bring the money into court, for the plaintiff to take the same upon discontinuing his action. *Lawrence v. Cox*, Hil. 33 Geo. 2. B. R. Before a justice is allowed to pay money into court, on action of false imprisonment, it must appear that he is sued as a justice for some misbehaviour in his office, 2 Bl. R. 859. *Casbourn v. Ball*; this may be by the notice and affidavit of the justice having been served therewith.

In actions
against justices.

So by 23 Geo. 3. c. 70. s. 30. tender of amends allowed to be made and pleaded by excise officers for any offence committed *quâ* excise officers; and 24 Geo. 3. c. 70. gives like privilege to custom-house officers.

23 G. 3.

(C) When and how to be pleaded, and of the Consequences thereof to the Parties in the Suit.

(C)

Formerly there was as much strictness preserved in the time of pleading a tender as in a plea in abatement, *viz.* within four days from declaration; but latterly the courts have considered it as a fair, honest, issuable plea, and have permitted

At what time
tender to be
pleaded.

permitted it to be pleaded, even after judge's order for time to plead has been obtained. *Kilwick v. Maidman*, B. R. Burr. 59. *Moore v. Smith*, 1 C. B. T. R. 369.

Not after im-
parlance.

But yet it should not strictly be pleaded after an im-
parlance.

As of same
term with de-
claration.

The plea, therefore, should be pleaded as of the same term with declaration, unless the declaration be delivered or filed so late, that defendant is not obliged to plead to it that term, and then it may be pleaded of course within the first four days inclusive of the next term, intitled as of the preceding term; and even afterwards, under particular circumstances, court will, on motion, suffer it to be pleaded as of the last term. Tid. 248. *Bayler v. Houlston*, Bar. 351. *Smith v. Philips*, Ib. 354. *Browne v. Hagon*, Ib. 357. *Ashberts v. Hughes*, Ib. 359. *Pitfield v. Mercy*, Ib. 362.

After demurrer.

After demurrer to declaration, plaintiff obtained judge's order and amended; defendant then moved for leave to plead tender as of last term, or that plaintiff might make his declaration of this term. Rule absolute. *Roberts v. Hughes*, Bar. 359.

How to be
pleaded.

A tender may be pleaded generally to the whole declaration; but defendant cannot plead *non assumpsit* to the whole, and a tender as to part. *M'Lellan v. Howard*, 4 D. & E. 194.

The usual way, therefore, is to plead as to all, except the sum tendered *non assumpsit*, and as to that sum a tender.

But defendant may plead not guilty, and a tender of amends in trespass. *Martin v. Kesterton*, 2 Blac. 1089. *Gerrington v. Manning*, Bar. 366.

It is not sufficient for plea to state that defendant was ready, and had always been ready to pay the debt, but it must set forth an actual tender. *French v. Watson*, 2 Wil. 74.

Of the uncove-
rment.

Where there is no fixed time for payment, defendant should not only shew a tender, but plead that he was always ready from the time of making the promise to pay, and yet is ready; and not merely from the time of making the tender. But where, by agreement, payment was to be at a fixed time, tender at and always ready from that time is sufficient. *Giles v. Hart*, Sal. 622. *Ferrand v. Pearson*, Bull. Ni. Pri. 156. *Sweatland v. Squire*, 2 Sal. 623.

If administrator pleads that he has been always ready since the death of intestate, it is bad. It should be, that his intestate was at all times, during his life, from the making of promise, ready to pay; and that administrator had al-
ways

ways been ready since his death. *Clemens v. Reynolds*, Say. 18.

If a tender at the day of corn, or of any other goods of a perishable kind, be pleaded, with a refusal, there is no need to plead *uncore prist*. 9 Rep. 79. *Peytoe's case*.

So in covenant, the damages, not the debt, being the thing in demand, it need not be pleaded with an *uncore prist*. *Carter v. Downish*, 1 Show. 137. Bull. Ni. Pri. 166.

In pleading a tender, defendant should plead such particulars as to shew that he has done all that could be done on his part to accomplish what by his agreement he was bound to do. *Lancashire v. Killingworth*, Sal. 624.

Though a tender is made, and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action; either in debt or *assumpsit*, but in bar of the damages only; for the debtor shall nevertheless pay his debt. Lord Raym. 254. *Giles v. Hart*.

And there is a difference in pleading a tender in debt and *assumpsit*; for in debt the damages are but accessory, but in *assumpsit* they are the principal. Therefore, in debt, defendant may plead in bar of the damages; but, in *assumpsit*, he ought to plead always ready with a *profert in cur.* and demand judgment *de ulterioribus damnis*. *Giles v. Hart*, Sal. 623.

But although such tender and refusal were made, yet if, at any subsequent period, plaintiff has made a fresh demand, and defendant has on his part refused to pay, the operation of the former tender is done away, and plaintiff may reply to such plea of tender, the subsequent demand and refusal, and if proved, be entitled to a verdict. 5 Bac. Ab. 12.

How, if fresh demand made.

But then it must be proved, that the person who made the demand was properly authorized to receive the money. Esp. N. P. 125.

A tender of money must be pleaded with a *profert in curia* of the money; and if the same be not paid into court, plaintiff may sign judgment. *Pether v. Shelton*, Str. 638. *Bray v. Booth*, Bar. 252.

Of the profert in curia.

In B. R.

The money tendered is paid to the signer of the writs, Messrs. Provost and Webb, who give a receipt for the same in the margin of the plea, which is to be signed by counsel, and filed with the clerk of papers.

In C. B.

Money is paid to one of the prothonotaries, who gives a receipt for same in margin of draft of plea. Pay 8d. per sheet, and 1s. 4d. for receipt. No rule is drawn up to pay money into court, but plea is filed.

How money to be paid into court on a plea of tender.

Money brought into court on a plea of tender cannot be taken out by defendant, though he obtains a verdict; for it is

Of taking the money out,

is the same as if money had been brought in on the common rule, to strike it out of the declaration. *Cow v. Robinson*, Str. 1027.

After a plea of tender, and money brought into court, the court will not admit the defendant to withdraw his plea, and plead the general issue. *Reeves v. Probart*, Bar. 330.

Plaintiff may either admit the tender or not. If the latter, he should not take the money out of court; for by taking it, he admits the same to be right, and judgment is given for defendant to go quit as to that plea. But if he admits it, and goes for further damages, on the ground that the tender was not sufficient to cover his demand, he may take the money out of court, enter an acquittal as to the tender, or confess the same in his replication, and proceed on the general issue for the residue. *Cliff v. Jones*, Ld. Raym. 1774.

And if he recovers any thing beyond, though under 40s. he is entitled to costs, if, together with the money paid into court on the tender, it is above 40s. *Heaward v. Hopkins*, Do. 448.

If he admits the tender, and enters an acquittal without going for further damage, he must pay defendant his costs. *Hill v. Williams*, Bar. 357.

If plaintiff will not receive the money, but takes issue upon the tender, and it is found against him, the money is lost for ever. Ld. Raym. 642. Co. Litt. 207. Hob. 199.

(D)

(D) How Defendant may avail himself of the true Time of the Tender, though subsequent to *Teste* of Writ, or the like.

If a tender be in fact made before the bringing of the action, though, by the *teste* of the writ, it may appear to have been afterwards, (as if tender in vacation and writ tested of preceding term,) the exact time when writ in fact was sued out may be shewn in pleading, or sometimes given in evidence contrary to the *teste*; for *factio cedit veritati*. See *ante*, Chap. 3. Sec. 1. E. 8.

But it is said, that if bill be filed on same day tender was made, though subsequent thereto, defendant cannot avail himself by pleading the prior tender.

A tender was made actually in the term, and before a bill filed against defendant; bill was afterwards filed same day, and a summons taken out before Mr. J. Buller, to intitle the bill (which was of Hilary term generally) the day it was actually filed. Mr. J. Buller said, that it would not at all assist defendant; for he could not take advantage of it in pleading

pleading, there being no fraction of a day. Hil. 30 Geo. 3. Imp. B. R. 292.

But if, by a special memorandum, defendant could avail himself of the tender, court will order a general one to be altered to the true day when bill was filed, or writ sued out. C. B. *Potts v. Creffwell*, Bar. 343. *Smith v. Key*, B. R. Str. 638.

SECTION XIV.

Of the Plea and Notice of Set-off.

- (A) Its Origin and Nature.
- (B) Of the Demands and Actions within the Statutes of Set-off.
- (C) Of the Parties between whom there may be a Set-off.
- (D) Of the Form of Notice of Set-off, and its Incidents.

(A) Its Origin and Nature.

(A)

That cross demands should be set off against each other by deducting the less sum from the greater, and the difference be deemed the sum justly due, seems clearly agreeable to the principles of natural equity. But the law, for the sake of the forms of proceeding and convenience of trial, has said, that each must sue and recover separately in separate actions.

No set-off at common law;

At common law, therefore, whenever there were mutual debts unconnected, each party was driven to his suit.

Courts of equity also followed the same rule; for otherwise they would have stopped the course of law in all cases where there was a mutual demand.

The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 Anne, c. 17. and 5 G. 2. c. 30. that mutual demands should be balanced. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring, that parliament interposed by 2 G. 2. c. 22. and 8 G. 2. c. 24.; but the provision does not go to goods or other specific things wrongfully detained; and therefore neither courts of law nor equity can make the plaintiff who

but remedied by statute.

sues for such goods, pay first what is due to the defendant, except so far as the goods can be construed a pledge, and then the right of the plaintiff is only to redeem. Hence it is that courts of law have inclined of late years so much in favour of liens. See the case of *Green and Farmer*, Burr. 2220.

(B) (B) Of the Demands and Actions within the Statutes of Set-off.

Of the demands and actions within the statutes of set-off

By the 2 Geo. 2. c. 22. "Where there are mutual debts between plaintiff and defendant, or if either sue or be sued as executor or administrator, where there are mutual debts between testator or intestate and the other party, one debt may be set against the other; and such matters may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require: so as at the time of pleading the general issue, where any such debt is to be insisted upon in evidence, notice be given of the particular sum or debt so intended to be insisted on, and upon what account it became due."

Stat. 8 G. 2.

In the construction of this statute, the then two chief justices, Lords Hardwicke and Eyre, differed with regard to setting off debts of superior nature against inferior, and *vice versa*, which occasioned the 8 Geo. 2. c. 24. Blac. 871. whereby "mutual debts may be set off against each other, notwithstanding they are of a different nature, unless where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all such cases, the debt intended to be set off shall be pleaded in bar; in which shall be shewn, how much is truly and justly due on either side: and in case plaintiff shall recover, judgment shall be entered for no more than shall appear to be due after one debt set against another."

By the general issue mentioned in statute is meant any general issue, (as *non est factum* in covenant,) according as the action may be. Bull. Ni. Pri. 181.

The remedy of set-off extended

As to affidavits to hold to bail.

So as to costs and judgments.

The courts have been gradually extending this equitable remedy of set-off: in the outset of a suit, they compel the plaintiff to make a set-off in the affidavit to hold to bail, and will not suffer him to swear to one side only of the account. So in costs at the close of the suit, the same reason and the same analogy extend to set off mutual judgments, and thereby narrow the greater execution, in whatever court it happens to be.

Thus in C. B. court ordered a judgment obtained in B. R. to be set off against a judgment obtained in C. B. and on payment

payment of the balance, execution to be stayed. *Barker v. Bramham*, Blac. 869.

So in all cases where the parties have mutual demands of costs against each other, court, on motion, will order them to be set off. See the cases *Schoole v. Noble* and others, 1 C. B. T. R. 23. *Nunez v. Modigliani*, Ib. 217. *O'Connor v. Murphy*, Ib. 657.

So costs of one judgment may be set off against debt and costs of another. *Thrustout dem. of Barns v. Crafter*, Blac. 826.

Nay, so far have the courts exercised this equitable jurisdiction, that in the case of *Mitchell and Oldfield*, 4 D. & E. 123. where the plaintiff had recovered a judgment against defendant, and the defendant had also recovered in another action against plaintiff and another; upon a motion to set off the debt and costs of the latter against the judgment of the former, although the one was a debt due to plaintiff alone, whereas the other was the joint debt of plaintiff and another to the defendant; and although it was observed, that it was not such a debt as could be set off, yet court made the rule absolute, on defendant's undertaking to pay plaintiff's attorney's bill in the first action, who had a lien on the judgment for his costs; *Ld. Kenyon* saying, that this case did not depend on the statutes of set off, but on the general jurisdiction of the court over the suitors in it; that it was an equitable part of their jurisdiction, and had been frequently exercised.

Where the debt is of an equal sum, there the action is barred; but if it be for a less sum than for what the action is brought, the defendant must pray to have it set off. *Bull. Ni. Pri. 179.*

A set-off, reducing plaintiff's demand under 40s., does not affect the jurisdiction of the superior courts. *Pitts v. Carpenter*, 1 Wil. 19. S. C. Str. 1191. *Hearward v. Hopkins*, Do. 448.

Two parts of a plea of set-off are as two counts in a declaration, and if one part be good, a general demurrer to the whole is bad. *Dowland v. Thompson*, Blac. 910.

The statutes authorizing a set-off only extend to actions founded on contracts either express or implied, but not to torts or actions of wrong, as detinue, trespass, and the like; nor to replevin, for that is not an action, but a remedy without suit. *Abfolom and Knight*, *Bull. Ni. Pri. 181.*

But to an avowry for rent, the tenant may plead payment of ground-rent to the original landlord, though he cannot plead a set-off. *Sapsford v. Fletcher*, 4 D. & E. 511.

Costs set off.

Even a separate judgment set off against a joint one.

Jurisdiction of court not affected by set-off reducing debt.

One part of set-off may be good though not another.

No set-off in actions founded on torts.

Set-off must be
for liquidated
demands.

Not damages
unliquidated;

nor penalties
for breaches of
agreement;

unless it is by
way of stipu-
lated damages.

Simple contract
debts may be set
off against spe-
cialties.

How to plead
set-off in actions
on bonds.

Real sum
shewn.

How far it ex-
tends to bail-
bonds.

The debt or demand set off must be liquidated and certain.

Damages, therefore, not yet recovered, cannot be set off, *Freeman v. Hyett*, Blac. 394.; as in action of covenant against defendant, unliquidated damages arising from the breach of other covenants to be performed by plaintiff, cannot be pleaded by way of set-off. *Howlett v. Strickland*, Cow. 56. *Weigall v. Waters*, 6 D. & E. 488.

So to an action of *assumpsit*, defendant pleaded articles of agreement with a penalty, and shewed a breach whereby penalty became due, and offered to set off: on demurrer, the plea was held not within the statutes, for there may not be *5 l.* justly due to defendant on the balance. *Nedriff v. Hogan*, Burr. 1024.

For debts to be set off should be such as an *indebitatus assumpsit* will lie for. Cow. 56. *Howlett v. Strickland*.

Where, therefore, the sum is not by way of penalty, but as stipulated damages, then it may be set off.

As if two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed. *Fletcher v. Dyche*, 2 D. & E. 32.

By the statute, a simple contract debt may be set off against a specialty debt, or *vice versa*; and such was the opinion of the court of B. R. even before the passing of the 8 G. 2. Bull. Ni. Pri. 179.

In debt on bond, the defendant craved oyer of the condition, which was to pay the plaintiff 10*l.* per annum during life; and then pleaded, that the plaintiff was indebted to him 500*l.* for money lent, &c. exceeding the yearly sum that had incurred for the annuity, and offered to set off as much, &c.; and on demurrer the plea was holden good. *Colins v. Colins*, Burr. 820. Bull. Ni. Pri. 180.

But in such action on a bond, defendant must set forth in the plea what is really due on the bond, before he is entitled to set off any cross demand under 8 G. 2. c. 24. and such averment is traversable. *Symmons v. Knox*, 3 D. & E. 65.

In debt on bond, defendant pleaded a greater debt in bar upon which the plaintiff prayed to have the condition of

his bond enrolled, which was to appear at Westminster, and demurred: and it was holden, that this bond was not within the 8 G. 2. for that statute relates only to bonds conditioned to pay money, and not to bail-bonds; and it was not within the statute 2 G. 2. because the plaintiff did not bring the action in his own right, but as trustee for another (for he was an officer in the palace court); but if it had been given to the sheriff, and by him assigned to the party, it might be otherwise, and then the penalty would have been considered as a debt, because it would have depended upon the 2 G. 2. Bull. Ni. Pri. 179.

Defendant may plead a debt by way of set-off to an action brought against him, though he has already commenced his action against the plaintiff for that very debt which he sets off, and plaintiff has, in such action of defendant, paid the amount into court. *Evans v. Proffer*, 3 D. & E. 186.

Set-off pleaded, though action brought for the debt set off

A. brought an action against B. for 30*l.*, to which there was no set-off; B. brings his action against A. for 11*l.* due to him; A. pleads, by way of set-off, the very debt for which he had before brought his action: both causes are set down for trial: A.'s cause comes on first, and there being no set-off, he gets a verdict for the whole sum; then B.'s cause comes on. A. may still insist upon the validity of his set-off, notwithstanding he has got a verdict for the very debt set off; for the verdict did not annihilate or extinguish the debt, nor change the nature of it or the rule of law: it only amounted to conclusive evidence, and he had the same right to set it off after verdict as before. The motion was rightly and truly given at the time when it was given, and the mere accident of his cause being tried first shall make no difference, and a *remittitur* may be entered on the first record for so much; B. ought to have set off his less demand in A.'s action. *Brown v. Baskerville*, Burr. 1231.

How such plea operates in cross actions.

A judgment can be pleaded by way of set-off, though a writ of error be pending thereon. *Reynolds v. Beering*, and *Evans & Proffer*, 3 D. & E. 187.

Judgment set off pending error.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards defeated, on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jacques v. Withy*, 1 D. & E. 557.

Judgment satisfied by fresh security given.

A debt barred by the statute of limitations cannot be set off: if it be pleaded in bar to the action, the plaintiff

Debt barred by statute of limitations cannot be set off.

may reply the statute; and if given in evidence at the trial, on a notice of set-off, it may be objected to. Bull. Ni. Pri. 180.

(C)

(C) Of the Parties between whom there may be a Set-off.

Of the parties between whom there may be a set-off.

How mutual credit may arise.

Of set-off in case of bankruptcy.

Mutual credit may be constituted, though the parties do not mean particularly to trust each other, as if a bill of exchange, accepted by A., get into the hands of B., and B. buy goods of A., there is mutual credit between A. and B., which may be set off by B., though A. did not know, when he let B. have the goods, that such bill was in his hands. *Hankey v. Smith*, 3 D. & E. 507. n.

By the 5 G. 2. c. 30. s. 28. the commissioners are empowered, where there has been mutual credit or mutual debts between the bankrupt and other persons, to set off one debt against the other, and the balance only is to be claimed or paid.

But it was holden, since the passing of that act, that in an action by assignees of a bankrupt, defendant could not set off a debt due from the bankrupt. *Ryal v. Larkin*, 1 Wil. 155.

But this case was afterwards impeached, as contrary to law, justice, and sense; and it was held, that the defendant might set off a debt due to him from the bankrupt, for the assignees are the bankrupt. *Ridout v. Brouch*, Cow. 134.

But where the assignees bring an action for a debt due to the bankrupt's estate, the debt to be set off must have existed at the time of the bankruptcy. The defendant, therefore, cannot set off cash-notes issued by the bankrupt, payable to bearer, bearing date before his bankruptcy, unless he shews further, that such notes came to his hands before the bankruptcy. *Dickson v. Evans*, 6 D. & E. 57.

If an action be brought by the assignees for a debt accruing to them as assignees since the bankruptcy, defendant cannot set off a debt due to him from the bankrupt before the bankruptcy. *Ib.*

If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring *assumpsit*, they affirm the contract, and then the creditor may set off his debt. *Smith* and others v. *Hodson*, 4 D. & E. 211.

Where

Where the defendant lent his acceptance to the bankrupts on a bill, which did not become due till after the act of bankruptcy, and was then outstanding in the hands of a third person, yet the defendant, having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set off the same under the words *mutual credit*, in the 5 Geo. 2. c. 30. s. 28. *Ib.*

Assumpsit will lie for a creditor's share under an order of commissioners for a dividend; and in such action, the proceedings before the commissioners are conclusive evidence of the debt, and the assignees cannot set off a debt due from plaintiff to the bankrupt. *Brown v. Bullen*, Do. 407.

If a demand be payable at all events, though at a future day, it may be proved under a commission of bankrupt against the debtor, or *set off* in an action brought by the assignees; but if it rest in contingency, whether it will be paid or not, it cannot be so proved or *set off*, unless it be secured by a penalty which is forfeited at law. *Handcock and others, assignees, v. Entwistle*, 3 D. & E. 435.

See also *Grove v. Dubois*, 1 D. & E. 112. as to brokers with commissions *del credere*, proving losses under notices of set-off, or under statute 5 G. 2. c. 30. in actions by assignees of bankrupts for premiums of insurance.

If an executor or administrator brings an action for money due to the testator or intestate, defendant may set off debt due from such testator or intestate to himself.

Of set-off in cases of executors, &c.

So if a partner or executor brings an action in his own right for money received by defendant *after* the death of the other partner or testator, defendant may set off whatever was due to him from plaintiff. *Smith v. Barrow*, 2 D. & E. 476.

In cases of partners.

B. appointed A. his attorney to receive rents, who, after B.'s death, received money for rent arrear in B.'s lifetime. B.'s executrix brought an action for this money in her own name, and A. gave notice to set off a debt due from B. to him: this was not allowed at the trial, because the testator had never any cause of action against A., for the money was not received by A. till after B.'s death. *Shipman v. Thomson*, East. 11 Geo. 2. C. B. Bull. Ni. Pri. 180.

A debt due from the plaintiff, as surviving partner to defendant, may be set off against a debt due from defendant to the plaintiff in his own right. *French v. Andrade*, 6 D. & E. 582.

Of demands in right of a man's wife.

A retainer in certain cases need not be set off, but may be given in evidence.

In cases of factors and principals.

A debt due to a man in right of his wife, cannot be set off in an action against him on his own bond. Bull. Ni. Pri. 179.

Where defendant had paid the plaintiff all the money he had received for him, except what he retained for his labour and service, he may, in an action for money had and received, give that in evidence on the general issue, without any notice of set-off; for it is not in the nature of a cross demand or mutual debt, but it is a charge which makes the sum of money received for plaintiff's use so much less. *Dale v. Sallett*, Burr. 2133.

If a factor dealing for a principal conceals that principal, the person contracting with him hath a right to consider him as the principal, and in an action afterwards brought by the real principal, may set off any claim he may have against the factor, in answer to such demand of the principal. *George v. Clagett*, 7 D. & E. 359. and see *Rabone v. Williams*, and other cases, in the notes to the above.

(D)

(D) Of the Form of a Notice of Set-off and its Incidents.

The form of a notice of set-off.

Plea general issue.

Of the form of the notice.

Mr. J. M.

Take notice, that the said defendant C. D. intends to give in evidence at the trial of this cause, and insist, that the said plaintiff A. B. was before and at the time of the commencement of this suit against the said defendant, and still is, indebted to the said defendant in more money than is due to the said plaintiff by reason of the promises and undertakings in the declaration mentioned, to wit, at aforesaid, in the said county, in the sum of 40l. for so much money before that time lent and advanced by the said C. D. to the said A. B. at his special instance and request; and in the further sum of 40l. for so much money before that time paid, laid out, and expended to and for the use of the said A. B. at his like special instance and request (and the like according as nature of debt may be); which said sums of money, or so much thereof as will be sufficient to answer and satisfy such demands as the said plaintiff A. B. shall be able to prove against the said defendant C. D. by reason of the promises and undertakings in the said declaration mentioned, at the trial of this cause the said C. D. will give in evidence, set off and deduct against such demands of the said plaintiff, according to the form of the statute in such case made and provided. Dated, &c. Yours, &c.

O. P. defendant's attorney.

To Mr. T. S. plaintiff's attorney.

The

The preceding notice must be written underneath the plea on the same sheet of treble penny; a copy of which must be kept by the defendant's attorney, it being necessary to prove a delivery thereof on the trial of the cause.

The debt that is set off must have been due at the commencement of the suit; it will not do to plead, that plaintiff was indebted to defendant in so much at the time of the plea pleaded. *Evans v. Proffer*, 3 D. & E. 186.

When the debt set off must be due.

Though in the case of *Reynolds v. Beering*, 25 G. 3. Do. 112. n. it was not long before held the contrary; and on the same principles also was the case of *Sullivan v. Mountagu*, Do. 106.

Defendant pleaded the general issue, but forgot to give notice at the same time of a set-off; and upon motion, the court gave leave to withdraw the plea, in order to deliver it again with a notice of set-off. *Blackbourn v. Matthias*, 2 Str. 1267.

General issue withdrawn and pleaded with notice.

A notice of set-off was as follows:

"Take notice, that you are indebted to me for the use and occupation of an house for a long time held and enjoyed, and now lately elapsed." *Per* Ld. Hardwicke C. J. These notices should be almost as certain as declarations; the legislature designed them to be in the nature of cross actions, and they should be expressed with great certainty, that the plaintiff might be able to make a proper defence to them. Had this been a declaration for use and occupation, it had certainly been bad; for it must have shewn the commencement and determination of it; afterwards it appeared, that the debt, designed to have been set off, was for rent reserved on lease by indenture; which not being mentioned in the notice, the chief justice said it was bad on that account also; for if this had been shewn, the plaintiff might probably have proved an eviction, or some other matter, to have avoided the demand. *Fowler v. Jones*, sittings at Westminster, Hil. 8 G. 2. Bull. Ni. Pri. 179.

Of the certainty requisite in notice.

Motion to amend a notice of set-off, but denied. Notices of this kind are, in this respect, like notices of trial, &c. which never were amended by the court. Bar. 294. Anon.

Notice of set-off not amendable:

But defendant may withdraw same, and plead *de novo*, non assumpsit, and a new notice.

but may be withdrawn and pleaded *de novo*. Plaintiff may by summons know particulars of set-off.

On plea or notice of set-off, plaintiff may take out summons for the particulars of defendant's demand, which he means to set off, and if such particular be not delivered by the

the time limited by the order, defendant is precluded going into his set-off; and when delivered, he can only give evidence of the matters contained therein. See Vol. II. Index, *Bill of Particulars*.

Sometimes necessary to pay money into court with set-off.

Where the defendant's demand does not countervail plaintiff's, he should, besides setting off his debt, move the court wherein the action is depending, for leave to pay so much money into court, as, with his own demand, will be sufficient to satisfy the plaintiff's: otherwise plaintiff will recover a verdict against him for the overplus.

CHAPTER VIII.

HITHERTO we have presumed, that the proceedings in the suit have gone on regularly, in order to bring some fact before a jury to be tried; but it often happens, either that the cause of action itself, as stated in the declaration, is not maintainable in point of law, or that the defence or justification set up by defendant in his plea is not a legal defence or matter which can, agreeable to the rules of law, be pleaded; or even if the cause of action, or the matter set forth in the plea, be in substance good, yet it may be informally set forth or pleaded; in all which cases, the plaintiff or defendant may object to the validity of the declaration or pleading, by way of *demurrer*, and may bring the point, which then becomes a mere question of law, to be argued before the judges in term time for their decision.

Again, a cause is frequently interrupted in its progress, and the course of the proceedings diverted, by some omission or negligence of the parties.

As the ends of justice would be defeated, were it in the power of either party, by his own laches or misconduct, to prevent his adversary from bringing the suit to a conclusion; it is therefore wisely established, by the usage and practice of the courts, that if the plaintiff or defendant omit to take, with due expedition, such steps as are required of them, the other party may still pursue his remedy, by signing judgment against the defaulter, and recovering the debt, damages, or costs, to which he may be entitled.

This omission is sometimes voluntary; and the party suffers such judgment to be signed against him, in order to save further expence, when he is conscious that the action cannot be supported, or that he has no ground of defence to it.

When this judgment is signed against the *defendant*, for want of proceeding on his part, it is called *judgment by default*; but when it is signed against the *plaintiff*, it is termed *judgment of non pros*, by reason of the plaintiff not prosecuting his suit; in which case, defendant is entitled to the costs he has been put to.

In both these cases, it is upon the supposition that the omission to proceed is before issue joined between the parties;

ties; for whenever such issue is joined, the plaintiff must proceed to trial by making up the record, giving notice of trial, and the like; and if the defendant does not appear when the cause is called on, the plaintiff will be entitled to a verdict: and if, after issue joined, the plaintiff should not proceed, still the defendant cannot sign judgment of *non pros*, nor can he (except in a few cases) carry down the record himself to trial; but he must pursue another remedy, given him by statute, namely, apply to the court to enter up judgment against the plaintiff, as if they had proceeded to trial, and plaintiff had been nonsuited: this is called *judgment as in case of a nonsuit*.

Independent of these judgments, grounded upon the default or neglect of the parties, sometimes the defendant *confesses* the plaintiff's cause of action to be just, and agrees that such confession should be entered upon the record: this is called *judgment by confession*. And sometimes, either before or pending the action, he gives a bond, conditioned to pay the debt by instalments, accompanied with a warrant of attorney, which is an authority to enter up judgment against him, provided the condition of the bond be not fulfilled: this is called *judgment on warrant of attorney*.

There is also another mode of proceeding, which is out of the ordinary course, namely, when some matter of record, as a fine, judgment, act of parliament, or the like, is pleaded, and issue is joined upon the existence of such a record; in this case, the fact is not tried by a jury, or by oral witnesses, but by the production of the instrument itself, and is called *trial by record*.

It is intended, in the present Chapter, to treat of the proceedings in each of the above cases, under their respective heads.

SEC. I. *Proceedings on Demurrer.*

SEC. II. *Judgment by Default.*

SEC. III. *Judgment of Non Pros.*

SEC. IV. *Judgment as in Case of a Nonsuit.*

SEC. V. *Judgment by Confession.*

SEC. VI. *Judgment on Warrant of Attorney.*

SEC. VII. *Trial by Record.*

SECTION I.

Of Proceedings on Demurrer.

- (A) Of general and special Demurrers.
- (B) How to proceed on Demurrer in B. R. and C. B.
- (C) How when there are Issues to Part, and Demurrer to Part.
- (D) Of waiving and withdrawing Demurrers, and amending after Argument.
- (E) Further general Observations on Demurrers.

(A) Of general and special Demurrers.

(A)

A demurrer in pleading is an admission by the adverse party of the fact charged in the count or declaration, plea, replication, &c.; but refers the law arising on such fact to the judgment of the court.

Demurrer, what.

A demurrer is either special or general.

Special or general.

There were special demurrers at common law, as well as general; but special demurrers were never necessary, except in cases of duplicity, and therefore seldom practised; for as the law was then taken to be on a special demurrer, the party could take advantage of no other defect, but that which was specially assigned for cause of demurrer. But upon a general demurrer, he might take advantage of all defects, that of duplicity only excepted; and there was no inconvenience in such practice; for the pleadings being at bar, *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general as upon a special demurrer. After the Reformation, when the practice of pleading at bar was altered, the use of general demurrers notwithstanding continued; and thereby this public inconvenience followed, that the party, whose pleading was demurred to, came into court, not knowing what he was to argue. This inconvenience occasioned the statute 27 of Eliz. which enacted, "That after demurrer joined, the judges shall proceed and give judgment, according as the right shall appear, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or cause of pro-

How at common law.

How altered by Stat. 27 Eliz.

ceeding,

Special demurrer revived.

“ceeding, except those only which the party demurring shall specially and particularly set down and express with his demurrer. And that upon such demurrer joined and entered, the court shall amend all such imperfections, defects, and wants of form, other than those which the party demurring shall particularly assign.”

Other statutes affecting special demurrers.

Stat. 4 & 5 Anne, c. 16.

This statute, in great measure, was restorative of the common law, and required, in all cases of form, a special demurrer; but a general demurrer still sufficed for all matters of substance. However, many things, which were construed to be matters of substance, since the making of the above statute of Elizabeth, are, by subsequent statutes, regarded but as matters of form only, and shall be aided, if not specially demurred to. *Vide* what omissions and defects are still aided after verdict, by the 16 & 17 Car. 2. c. 8. and other statutes of jeofails.

The statute 4 & 5 Anne, c. 16. in furtherance of the statute of Elizabeth, enacts, That no exception shall be taken of the following matters on a general demurrer, which before were regarded as matters of substance, and were fatal on a general demurrer, viz. “An immaterial traverse, default of entering pledges upon any bill or declaration, default of alledging of bringing into court any bond, bill, indenture, or other deed, mentioned in the declaration or pleading; default of alledging of the bringing into court letters testamentary, or letters of administration; the omission of *vi et armis, et contra pacem*, or either of them; or the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or for not alledging *prout patet per recordum*, or matters of the like nature.” So that, for these defects, the party must now demur specially.

A departure requires a special demurrer.

A departure, though not mentioned, has been held to be within this act; and therefore, for a departure in pleading, there must now be a special demurrer, though, before this statute, a departure was fatal on a general demurrer.

The 4 & 5 Anne does not give any remedy upon general demurrer, but in matters of the same nature with those which are there specified. *Hodgethorn v. Thurlock*, Com. 306.

Statutes do not extend to pleas in abatement.

The statutes 27 of Eliz. and 4 & 5 Anne, directing the judges, on demurrer joined, to give judgment according as the right shall appear, extend only to such demurrers as go to the action, and not to demurrers to pleas in abatement. *Moore*, Com. 309.

Therefore

(A) Sec. I.] OF PROCEEDINGS ON DEMURRERS TO

Therefore a special demurrer is never necessary to a plea in abatement, but a general one will do. *Watts and Goodman*, 1 Barn. 11.

The general rule is, that in all cases where pleadings are demurred to, for matter of form, and for the causes specified in the acts above mentioned, a special demurrer is requisite; but whenever the demurrer is for matter of substance, a general demurrer is sufficient.

Rule as to general or special demurrer.

Duplicity is still aided on a general demurrer; for to say because plea is double, and wants form, is not sufficient; it ought to shew in what the duplicity consists. *Lamplugh and Shortridge*, Com. 115.

Notwithstanding a general demurrer still suffices for want of substance, yet, in doubtful cases, it is best to shew the cause of demurrer; because, on a special demurrer, any matter of substance, though not expressly alledged, may be taken advantage of; whereas no advantage can be taken of any matter of form on a general demurrer.

A plea may be bad on a general demurrer, though it might be helped after verdict, as *nil debet* to an action on bond. Anon. 2 Wil. 10.

Plea bad on demurrer, though aided by verdict.

A demurrer, whether general or special, ought to be signed by a counsel in B. R. and serjeant in C. B.

Demurrers must be signed.

(B) How to proceed on Demurrer.

(B)

In B. R.

In the King's Bench, if there is a general demurrer to the declaration, the plaintiff's attorney adds a joinder thereto, and makes up and delivers the issue thereupon, for which the other side must pay 4d. per sheet, besides stamps; if not paid for on demand, judgment may be signed: but if the demurrer is special, or if general, after a special plea pleaded, the same must be filed with the clerk of the papers, who makes up the demurrer book with the joinder, and gives a rule in the margin for the defendant to receive and return the same to plaintiff's attorney (this must be done in 24 hours, and entries be paid for); if he returns demurrer book and pays for the entries, an incipitur is entered on the King's Bench roll, plaintiff's attorney

In C. B.

In the Common Pleas, when demurrer is joined, the plaintiff's attorney, in all cases, makes up the demurrer book, and delivers it on treble penny stamp paper to the defendant's attorney, who pays for it at the rate of 4d. per sheet, besides stamps; and also for entering his pleadings and warrant of attorney; then plaintiff's attorney enters the whole proceedings on the roll, which is got of prothonotary, and having delivered the same to the secondary, he gets a serjeant to move for a concilium, or day to argue it; and the secondary draws up a rule accordingly, which must be served on defendant's attorney, and the demurrer put down for argument, and must be of same term issue is joined on demurrer, file warrants of attorney and docket

How to proceed.

torney then gets a number roll and carries the same with the demurrer book to the clerk of the judgments, enters and docketts the issue, if there is one, finishes the entry on the roll, and then the same is carried to and filed at the nisi prius office in Gray's Inn.

When this is done, a motion is to be signed by counsel for a concilium or day to argue the demurrer, pay 10s. 6d. take your roll to the clerk of the papers, who will mark it "read," pay 1s. 6d. and he will sign his initials on counsel's brief; then you draw up a rule with the clerk of the rules, pay 4s. 6d. and apply to the clerk of the papers to set down the cause, pay 1s.

If the demurrer is to be argued, serve rule for concilium on the attorney of the other side, (and indeed it is fair to do this in all cases whether demurrer be argued or not,) make four copies of the demurrer book on unstamped paper, plaintiff is to deliver two, viz. one to the chief justice, and the other to the senior judge, two days before the day of argument, and defendant ought to deliver two to the other two puisne judges on his part; but should be not have done so before eight in the evening of the day, two days before the argument, then deliver the other two to the other two judges (R. M. 17 Car. 1.) ; pay the clerks each 2s. When defendant has neglected to deliver his two books as above-mentioned, he cannot be heard on argument; so that plaintiff need only make a brief of demurrer for counsel, with one guinea fee, to move for judgment, which is done of course when called on, upon the day of argument; at which day attend and pay criers 4s.

Go in the evening to clerk of the rules, get rule for judgment, and if the judgment be final, as if it be an action of debt, stamp the rule with

docket roll at prothonotary, pay 8d. per sheet for entries, then make a brief for serjeant to move for concilium, take it to secondary, who will mark the roll "read in court," pay crier 1s. get rule of secondary in the evening, and serve copy on defendant's attorney, and at the time when the rule is drawn up by secondary, set down with him cause for argument, then deliver copies of demurrer book to the judges, all four of which are in this court delivered by plaintiff's attorney, defendant paying for two days at least before the argument; if not paid, defendant shall not be heard by his counsel when demurrer comes on. Mich. 6 G. 2.

If judgment be for plaintiff, proceed as in B. R. mutatis mutandis, according as judgment be interlocutory or final. Demurrer must be signed by serjeant.

In order to compel plaintiff to go on to argument, get a rule of secondary to enter the issue, which is a four day rule, serve copy on plaintiff's attorney; if he enter the issue, and does not proceed to move for a concilium, defendant may move and proceed to argument the same as plaintiff; if plaintiff does not enter issue agreeable to rule, sign judgment of non pros.

with double half crown, and proceed to tax the costs; having first, if the roll be already carried into the treasury, bespoke the rule to be at the master's; but if not carried in, then enter proceedings thereon yourself; pay 3s. 6d. to master for marking it, and take out execution.

If demurrer be argued, and action in debt, no rule for judgment need be given; but if the judgment be only interlocutory, as if it be an action on the case or the like, then, having drawn up rule for judgment, get a treble penny stamp paper, enter memorandum thereon, get judgment signed thereon by clerk of judgments, and give notice of executing writ of inquiry, and proceed as in other cases of judgment by default.

If plaintiff refuses or neglects to enter demurrer, defendant may get a rule of secondary to compel him; and on default, he himself may enter such demurrer on record, or *Q* whether he may not sign judgment; but if he wishes to have demurrer argued, then let him make up paper-book, and get a rule of master, which he gives on the book, or on a detached piece of paper, thus:

Unless the plaintiff enters the issue on record, on next after, let the same be entered on the part of defendant; enter it at clerk of rules, and serve copy when the book is delivered.

If the party refuses to join in demurrer, you get a rule for that purpose, as when a party neglects or refuses to reply, rejoin, &c. and then the party must do it within four days, otherwise judgment may be signed.

How to compel party to join in demurrer.

A demurrer is to be entered on the roll of the term in which it is joined. *Cortizos v. Munoz*, Bar. 328.

When issue is joined in demurrer, either party may proceed to argument. Nor need the defendant wait for a default in plaintiff, as in the case of trial by proviso; but he

may make up the demurrer-book, deliver it, and pay for entries; and having given rule to enter the issue, and procured the pleadings to be entered of record, he may move for *concilium*, and proceed to argument, as is usual for plaintiff upon the like issues. Notes to Rules and Orders, 177. edit. 1795.

Notice of executing inquiry may be given on back of demurrer.

Where the defendant demurs to the declaration, his attorney shall be obliged to accept of notice of executing the writ of inquiry, (if it is an action founding in damages,) on the back of the joinder in demurrer; and if defendant pleads such a dilatory plea as the plaintiff is obliged to demur to, defendant's attorney shall be obliged to accept of notice of executing a writ of inquiry on the back of such demurrer. Tr. 10 Geo. 1. C. B. The same rule in B. R. Vide *post*. Sec. 2. C. 2.

How paper-book to be delivered, &c.

After joinder in demurrer, plaintiff moved for a *concilium*, and afterwards delivered the paper-book the same day; which was held to be irregular, and the cause ordered to be struck out of the paper. He should have delivered the paper-book before he moved for *concilium*. *Sbarpe v. Sharpe*, Bar. 163. But judgment cannot now be signed, for want of paying for the paper or demurrer-book. *Fuller v. Osborn*, 6 D. & E. 477. Imp. K. B. 322.

Of moving for *concilium*, &c.

In *assumpsit*, the defendant pleaded the general issue, and also the statute of limitations; the issue was found against him at the assizes; but as to the special plea, there was a replication, rejoinder, and sur-rejoinder; to which the defendant demurred, and the plaintiff joined in demurrer. This term the plaintiff made it a *concilium*, put it in the paper, and nobody to support the demurrer, obtained judgment: it was now moved to set aside this as irregular, the rule for the *concilium* having never been served, or any notice given of putting it in the paper. But the court held it not to be irregular, and that it was the duty of the defendant to search, since he must expect the plaintiff would proceed. Then it was moved to set it aside upon payment of costs, upon the foot of setting aside regular judgments. But the court said that was never to be done, but where the defendant was to plead to the merits, not to give him the advantage of a nicety in pleading; and if there was any ground for the demurrer, (as, in fact, there was,) he might bring a writ of error. *Forbes v. Lord Middleton*, Str. 1242.

Defendant must search for *concilium*; plaintiff not obliged to serve rule when defendant demurs.

Signing a *concilium* deemed a step in the cause.

If plaintiff take no step in the cause for three terms, and in the fourth sign a *concilium*, and obtain judgment in the fifth,

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fifth, the signing of the *concilium* is taking a step in the cause, so as to make it unnecessary to give a term's notice. *Bland v. Darley*, 3 D. & R. 530.

(C) How to proceed when Issue to part, and Demurrer to part.

(C)

Where there is an issue to part, and demurrer to part, you may either try the cause, or argue the demurrer first, at election. If the latter, all the proceedings are entered on the roll as in the paper-book, and you proceed as if there was no issue *in fact* at all.

How if issue to part, and demurrer to part.

Formerly, where there was a demurrer to part, and an issue upon the other part, and judgment was given for the plaintiff on the demurrer, he must have entered a *non pros* as to the issue, and proceeded to a writ of inquiry on the demurrer; but without a *non pros*, he could not have a writ of inquiry; because, on the trial of the issue, the same jury would ascertain the damages for that part of which the demurrer was. Sal. 219. pl. 6.

There were four counts in the declaration, *non assumpsit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of inquiry, and executes it. This was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted, that the plaintiff ought to take out a *venire, tam* to try the issue, *quam* to inquire of the damages upon the demurrer; *sed per curiam*, that is, indeed, the course, where the issues are carried down to trial before the demurrer is determined, and in that case, the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reason why we should force him to carry down the cause to *nisi prius*; and as to the want of a *nolle prosequi* upon the roll, he may supply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry must stand. *Fleming v. Langton*, Str. 532.

Where there are issues in fact and in law, the plaintiff may waive the issues in fact, and take out an inquiry upon the demurrer.

In error, *è C. B.* in an action upon the case on several promises, there is judgment on demurrer as to one count, whereupon the plaintiff enters a *nolle prosequi* as to the rest, and the defendant is put without day.

Where a *nolle prosequi* is entered, the plaintiff need not be amerced.

It was objected, that this is a confession that the plaintiff had no cause of action as to those counts, and therefore he should be amerced *pro falso clamore*. But Eyre J. (*solus*) thought

thought it agreeable to all the entries, and so the judgment was affirmed. *Davies v. Hoyle*, Str. 574.

Judgment when obtained, must be signed before inquiry executed.

Plaintiff obtained judgment upon arguing a demurrer in an action upon the case, and proceeded to execute a writ of inquiry, without getting judgment signed by the prothonotary; which the court held to be irregular, and set aside the writ of inquiry. *MacCarty v. Parminter*, Bar. 229.

(D)

(D) Of waiving and withdrawing Demurrers, and amending after Argument.

General demurrer not to be waived for special, but it may vice versa.

Defendant cannot waive a general demurrer, and give a special demurrer or special plea; but he may strike out of paper-book special plea or demurrer, and return it with general issue or general demurrer. N. on R. T. 5 & 6 Geo. 2.

So a general demurrer cannot be waived, and general issue pleaded, but a special one may; and general issue with notice of set-off be afterwards pleaded.

When it may be withdrawn, and pleadings amended.

In an action against bail, court refused to give leave to withdraw a demurrer, and amend after demurrer had been argued, and the opinion of the court was known. *Saxby v. Kirkus*, Say. 117.

Yet after argument on special demurrer, leave has been given to amend, on payment of costs. *Luxton v. Robinson*, Do. 620.

After a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause why plaintiff should not have leave to withdraw his demurrer, and to reply to the plea. No cause being shewn, rule made absolute. *Giddings v. Giddings*, Say. 316. So *Howell v. Mac Ivers*, 4 D. & E. 690.

After the demurrer was argued, and the justices had given their opinion, judgment was suspended for a week, in order to give the defendant time to move for leave to withdraw the demurrer, and amend. *Rennale v. Rennale*, Say. 317.

Debt against defendant, as heir on the bond of his ancestor. Plea *reins per descent*. Replication assents. Demurrer *inde*, and joinder; and the cause was set down. Then defendant moved for leave to withdraw the demurrer, and rejoin issuably, on payment of costs. On shewing cause, plaintiff insisted, that by the demurrer he had been delayed an assizes, and defendant now came too late to withdraw his demurrer, unless he would give judgment for plaintiff's security.

security. The serjeant for defendant urged a diffidence of his own opinion as to the validity of the pleadings, and was fearful to venture the argument; because, if judgment had passed against his client on demurrer, the debt must be paid out of defendant's own goods; if on verdict, out of assets. Rule absolute by three judges. *Denton contra. Hunt v. Puckmore*, Bar. 155.

Declaration in an action on the case was of two counts against two defendants; in second count, only one of defendants was named. Defendant demurred. Plaintiff entered a *nol. prof.* as to the last count; but court were of opinion that he could not enter *nol. prof.* in that stage of proceedings, but they gave him leave to amend, on payment of costs. *Drummond v. Dorant*, 4 D. & E. 360.

Where the demurrer is first argued before any trial of the issues, the court will give leave to amend, as in the case of *Giddings*, Say. 316. But there never was an instance of amending an issue at law, after a verdict has been found on the issues upon facts, and contingent damages found upon the demurrer. *Robinson v. Raley*, Burr. 322.

Where demurrer argued before trial of issue, amendment allowed, not contra.

(E) General Observations on Demurrer.

(E)

A demurrer on the merits is an issuable plea within the judge's order. *Wright v. Russell*, 2 Blac. R. 923. *Derwey v. Sopp*, Str. 1185.

Demurrer an issuable plea.

If a demurrer is badly drawn, as if in a demurrer to a plea in abatement, it concludes with praying judgment of the action, instead of *respondeas ouster*, it is a discontinuance, and cannot be amended without consent of the other party. *Maynard v. Hopkins*, Say. 46.

Not to be amended.

The entry of the judgment was, *ideo consideratum est*, &c. and not *Et quia videtur curia*, &c. and for that cause it was reversed. *Atwood v. Burr*, Sal. 402. *Ld. Raym.* 821. S. C.

Proper form of entry of judgment.

Tuesdays and Fridays in every term are called special paper-days, because the court goes into the paper before they enter upon motions.

Paper-days.

All causes standing for argument in the special paper are to come on in the same order in which they are there entered, and so to continue to stand till they shall be argued; and none to be put off, without a previous special application to the court. And all special causes to be set down by the clerk of the papers, shall be entered at least *four days* exclusive of the day of argument. R. M. 30 G. 2.

Causes to be argued in their turn.

SECTION II.

Of Judgment by Default.

- (A) How to sign Judgment by Default, and of the Proceedings therein.
- (B) Of the Effect of such Judgment, in what Cases Plaintiff is entitled to it, and how and when to be set aside.
- (C) Of the Writ of Inquiry, &c.
- (D) Of setting aside the Inquisition, arresting the Judgment, and amending the Writ and Proceedings.

(A) (A) How to sign Judgment by Default, and of the Proceedings therein.

K. B.

Get a roll from K. B. office, enter thereon the warrants of attorney and memorandum of declaration, which is sometimes called making an incipitur on roll; get also a treble penny stamp paper if judgment be interlocutory, and a double 2s. 6d. stamp if final; enter thereon an incipitur of the declaration being merely the memorandum and a few words of declaration; carry judgment-paper and roll to clerk of judgment, who will sign same; pay 4d. per sheet, and 8d. filing warrants of attorney.

C. B.

Make incipitur of declaration on same stamped paper as in K. B. and also warrants of attorney on roll; file them with clerk of warrants; pay in debt. trespass, and detinue 4d. in other actions 8d. each. He marks judgment-paper; carry it to the prothonotary with draft of declaration, who will sign judgment; pay him 2s. if declaration of same term and already filed: if not, 8d. per sheet for declaration, and 3s. for judgment by confession and warrant of attorney.

If judgment be final, get the master in K. B. or prothonotary in C. B. to tax costs, who will mark same on judgment-paper, and then sue out execution.

But if judgment be only interlocutory, after having signed judgment as above directed, proceed to sue out and execute writ of inquiry; first give

Notice of Inquiry;

which may be in the following form:

Take notice, that a writ of inquiry of damages in this cause will be executed on the day of instant, between the hours of and of the clock in the forenoon of the same day, at the

Dated the day of

1798.

Yours, &c.

T. S. Plaintiff's Attorney.

To Mr. W. H. Attorney for defendants.

If in Middlesex and in term time say, at the King's Arms Tavern, Palace Yard, Westminster, in the county of Middlesex; if in vacation, at the sheriff's office, in Took's court, Curfitor street, Chancery-lane, in the county of Middlesex.

If in London, whether term or vacation, at the secondary's office, No. 10, Grocer's Hall-court, London.

If in the country say, will be executed at the house of A. B. commonly called or known by the name or sign of the in street, Cambridge, in the same county.

And in all the above cases, if you mean to attend by counsel, insert it in the notice.

As to time when notice ought to be given, and what it should contain, and the like; see post, Ch. 2. and also Notice of Trial, Ch. 9. Sec. 2.

Of countermanding and continuing Notice.

This notice may be countermanded if any thing should prevent execution of inquiry. Notice of countermand must be given according as the notice of trial was; if eight days notice of trial, two days notice of countermand is sufficient; but if fourteen days notice of trial, then six days notice of countermand.

The form thereof may be:

I do hereby countermand the notice of executing the writ of inquiry given you in this cause. Dated, &c.

So notice of executing inquiry may be continued to another day upon giving notice of such continuance two days before execution.

I do hereby continue the notice of executing the writ of inquiry given in this cause to the day of next, when the same will be executed between the hours of, &c. at, &c. Dated, &c.

Of the Writ of Inquiry, making it out, and executing it.

The writ of inquiry is to be engrossed on a 3s. 6d. stamp parchment in B. R. not to be signed, neither by bill nor original; sealing 7d. In C. B. to be signed by the prothonotary; pay 1s. 4d. for first count, and 8d. every other; or 8d. for first sheet, and 4d. every other; sealing 7d. Indorse thereon the day for which you have given notice of execution; carry it to the sheriff's office the day before it is to be executed in B. R. and in C. B. R. Hil. 23 Geo. 3. and sheriff will cause a jury to be returned. If you think the attendance of any witnesses necessary at the execution, sue out subpoenas as in cases of trial; pay in London 1l. 9s. 4d. and for every witness 4d. In Middlesex, 1l. 10s. 4d.; other counties 1l. 11s. 6d. Attend at the day of execution.

Of subpoenaing Witnesses.

Witnesses may be subpoena'd if they will not voluntarily attend; blank-forms may be had at the stationers, and four may be put in one subpoena.

It must be engrossed on a 3s. 6d. stamp, signed and sealed, and each witness served with a copy and paid 1s.

In B. R. a præcipe for subpoena must be made out for the office, but no occasion for it in C. B.

If you wish to attend by counsel, give notice according to the other side, or it will not be allowed in costs; besides which it would be deemed unfair to take the other party by surprise.

When writ is returnable, call for it at the sheriff's office, who will return it with inquisition :hereon.

Of final Judgment.

B. R.

On the Day of Return.

Give a rule for judgment on inquisition at the clerk of the rules, pay 1s. 10d. it is a four day (a) rule, exclusive of the day it is given; and Sunday or holiday intervening is not reckoned. Give it in same manner as rule to plead: if no motion to set aside inquisition, or to arrest the judgment; when rule expires proceed to final judgment on inquisition, as in case of postea.

Rule not to be given till writ returnable.

C. B.

No rule, necessary; but having waited (a) four days after return of inquiry, proceed to final judgment on inquisition, as upon postea.

Of executing Inquiry before a Judge.

Upon particular occasions it is advisable to execute inquiry before a judge; application is made to the court upon affidavit, stating the circumstances of plaintiff and defendant, and nature of the action; it is a rule to shew cause, and if made absolute, a rule is drawn up for sheriff to summon a good jury. A common writ of inquiry is made out, directed to the sheriff, and notice is given for the sittings or assizes generally, and not for any particular day. Writ with the rule is sent to sheriff; enter the cause with the marshal as if it were a record, same fees paid, and afterwards sheriff returns inquisition and has his usual fees; proceed to final judgment on return of inquisition as above directed.

In vacation this may be done by an order of judge for such rule to be drawn by clerk of rules, upon a common motion paper signed by counsel being carried to him.

This indulgence is not merely confined to cases where any matter of law is likely to arise in the course of the inquiry, as is said in a late book of practice, Tidd 319. but also where the facts are important. I have known it in an action for breach of promise of marriage where no point of law was likely to arise; but that was in a country cause: it was refused in the case of Boddington v. Boddington, which was an action for crim. con. the court saying, that there was little ground for such an application in a town cause, the sheriff being so much accustomed to the execution of these writs of inquiry. K. B. Trin. T. 1797.

(a) Within these four days, defendant may move to set aside inquisition, or in arrest of judgment.

(B) Of

(B) Of the Effect of Judgment by Default, in what Cases Plaintiff entitled to it, and how and when to be set aside.

It was formerly held, that defendant was out of court by his default, and that to all purposes, except final judgment being given against him; so that if, after a default at the trial, and inquest had thereon, the issue was found immaterial, no repleader could be awarded. *Staple v. Hayden*, Salk. 216. Nor could defendant enter a suggestion on the roll, where plaintiff, in an assumpsit, only recovered 22s. damages. *Brampton v. Crabb*, Str. 46. In like manner, where plaintiff was nonsuited, he used to be held out of court for all purposes, but that of having judgment signed against him; but it has been long since the practice of the courts to set aside nonsuits, where the justice of the case requires it; so have they relaxed with respect to defendant, by considering him in court to many purposes, though judgment has been by default. *Barnay v. Tubb*, 2 H. Blac. 356.

Effect of judgment by default.

By the practice of the courts, there are certain stated times in which the defendant must proceed by pleading, rejoining, or the like, according as the stage of the cause may be, and which if he neglects to do, plaintiff may avail himself of the default and sign judgment; the cases, therefore, in which plaintiff is entitled to judgment by default are as numerous and various as the defaults of which the defendant may be guilty. To know whether plaintiff is justified in signing judgment by default, refer to such Chapter and Section of this work as treats of that part of the proceedings, (whether pleading, or rejoining, or the like,) in which it is conceived defendant has been guilty of any laches, and on account of which plaintiff thinks himself entitled to sign judgment.

In what cases judgment by default may be signed.

Although defendant has pleaded, yet if he afterwards neglects to rejoin, or enter sur-rebutter, or the like, plaintiff may strike out all the pleadings, and sign judgment as for want of a plea; for such subsequent default is considered as an abandonment of the plea. *Petrie v. Fitzroy*, 5 D. & E. 152.

If judgment by default be irregularly signed, court, on motion, will set it aside; but defendant must be cautious to apply in time, and not do any thing which may be construed into a waiver of the irregularity; nor must he lie by and suffer plaintiff to take further steps in the cause.

When judgment by default will be set aside for irregularity.

In general, it is said, that this application must be made two days before inquiry executed; and if the irregularity be

be

When defendant should apply to the court.

be in the notice subscribed to process, it must be made before judgment signed. *Grimes v. Cleaver*, Bar. 255.

But the best and safest rule is to apply in the first instance, and so use all diligence to get the error rectified by the court; otherwise they will seldom listen to the application.

In a joint action, judgment by default, one of the defendants had no notice of writ or declaration; after inquiry executed, on motion to set aside proceedings, it was urged it came too late; but *per cur.* the judgment can never be good as to him that was not served; and as the judgment is joint, it must be set aside as against all the defendants. *Caulson v. Turnbull* and others, Prac. Reg. 237. Bar. 246.

When on payment of costs, though no irregularity.

But if judgment by default be regularly signed, court will, any time before inquiry executed, set it aside upon terms, on defendant's paying the costs, and pleading issuable to such action *instante*; *Cavil v. Burneford* and others, Burr. 568.; and if required, taking short notice of trial, *Matthews v. Stone*, Bar. 242.; or bringing the money into court, &c. *Welland v. Rock*, Bar. 243.

But this is only where defendant pleads to the merits, not to give him the advantage of any nicety or informality in pleading, by letting him in on a demurrer. *Forbes v. Lord Middleton*, Str. 1242.

Or upon the plea of the statute of limitation. *Willit v. Atterton*, 1 Blac. 35.

Or where it contains special matter that is questionable, and designed to draw plaintiff to demur. *Wood v. Cleveland*, Sal. 518.

It is said such regular judgment will only be set aside on payment of costs, when plaintiff has not lost a trial. *Sistad v. Lee*, Sal. 402.

But held otherwise in *Prudhoc v. Armstrong*, Bar. 256.

And in general, it is expected that such application be made quickly, and that there be an affidavit swearing to merits.

(C)

(C) Of the Writ of Inquiry.

(C. 1) *In what Cases necessary.*

(C. 2) *Of the Notice of Inquiry, &c.*

(C. 3) *Of the Execution thereof, &c.*

(C. 1)

(C. 1) *When Writ of Inquiry is requisite.*

Its nature.

When judgment is obtained by default, if the action be in debt, covenant, or the like, (*Theilsson v. Fletcher*, Doug.

315.) to recover any fixed specified sum, and there is no occasion for the interference of a jury to ascertain the amount of plaintiff's demand, it is then a *final* judgment, and plaintiff may proceed immediately to get his costs taxed, and sue out execution as before directed. But if the action be in assumpsit, or case, or covenant, or the like, to recover any unliquidated debt, or uncertain damages for an injury sustained, it is then called interlocutory judgment; it being necessary, before such judgment can be finally entered up, to take some further step, in order to get such debt or damages liquidated and assessed; this is done by suing out a writ of inquiry, directed to the sheriff, who summons a jury for that purpose. See *ante*, Sec. I.

Judgment by default, final or interlocutory.

But a writ of inquiry is a mere inquest of office, to inform the conscience of the court, who, if they please, may themselves assess the damages. *Bruce v. Rawlins*, 3 Wil. 61. Doug. 316. n.

In what cases writ of inquiry necessary.

Thus, of late years, in certain cases, they have assessed damages, which were formerly assessed by a jury on writ of inquiry.

In actions on bills of exchange and promissory notes, the courts now allow the plaintiff, after judgment by default, to refer it to the master or prothonotary, to compute what is due for principal and interest; it is a rule to shew cause, granted of course in all ordinary cases. *Rasbleigh v. Salmon*, 1 H. Blac. 252. *Andrews v. Blake*, Ib. 529. *Longman v. Fenn*, Ib. 541. *Shepherd v. Carter*, 4 D. & E. 275.

When in actions on bills of exchange, &c.

If, however, there be any particular circumstances in the case, or any thing that renders the calculation of what may be due uncertain, this rule will not be granted; as if the bill of exchange be for so much *foreign* money, the value of foreign money being uncertain. *Maunsell v. Ld. Massarene*, 5 D. & E. 87.

The courts are cautious not to extend this practice too far, and refused the rules after judgment by default, in an action of *assumpsit* on a foreign judgment. *Messin v. Ld. Massarene*, 4 D. & E. 493.

Although at present we are treating of the writ of inquiry, in cases of judgment by default, yet it may be proper to observe, that writs of inquiry sometimes issue, even after trial and verdict, where the jury have omitted to assess the damages of plaintiff.

Of the writ of inquiry when jury has omitted to assess damages at the trial.

If, upon the trial, there is a demurrer to evidence, and the parties join in demurrer, the jury may either at the time assess damages conditionally, in case plaintiff has judgment on the demurrer; or they may be discharged, (which

In cases of demurrer upon evidence.

is

When the inquiry of damages is ordered by any particular statute, and jury have omitted to assess them.

How such statutes to be construed.

Where defendant has confessed part of the plaintiff's charge, how damages to be assessed thereon.

is the usual way,) and after the demurrer is determined, plaintiff may have a writ of inquiry to assess the damages. *Darrose v. Newbott*, Cro. Car. 143.

In many cases, acts of parliament direct the jury to assess damages, and applications have been frequently made for writs of inquiry to supply their omission; the granting of which depends upon the nature of the jury's inquiry, and upon the words of the particular statute. If the jury are to inquire of damages as part of their charge; that is, if, from the nature of the issue, damages are consequent and dependent upon it, then no writ of inquiry can go to supply their omission of assessing damages at the trial; because, in case they had found excessive damages, an attaint would lie against them; and therefore, if a writ of inquiry were allowed, the party might be deprived of his remedy by attaint; but where the damages are merely collateral, and not put in charge to the jury, and they are only to inquire thereof as an inquest of office, then their omission so to do may be supplied by a writ of inquiry; because, in such case, had they inquired thereof at the trial, and found excessive damages, no attaint would lie, and therefore the party loses no benefit; for no attaint lies on an inquest of office: this seems to be one leading distinction which pervades all the cases on this point. See *Kynaston v. the Mayor of Shrewsbury*, Cas. temp. Ld. Hard. 295. *Valentine and Fawcett*, Ib. 138. *Erihon v. Le Maitre*, 2 Wil. 368. *Ben-net v. Hart*, Sny. 214. *Cheyney's Case*, 10 Co. 118. *Herbert v. Waters*, Sal. 205.

The other distinction arises from the particular words of the statutes; for although the damages may be a collateral matter of inquiry, yet if the statute restrains such inquiry to any particular jury, no writ of inquiry can supply their omission: such is the 17 C. 2. c. 7. concerning distresses for rent, where the same jury returned to try the issue, must inquire of the arrears of rent, &c. *Herbert v. Waters*, Sal. 205.: whereas by the statute of Eliz. c. 2. s. 19. relating to suits brought against overseers of the poor, for taking distresses for poor-rates, it is not confined to the same jury, but a writ of inquiry is also given. Ib. *Valentine v. Fawcett*, Cas. temp. Ld. Hard. 138. 2 Str. 1021.

If defendant, in pleading, confesses any part of plaintiff's charge, and denies the residue, and the venue is awarded as well to try the issues joined as to assess plaintiff's damages, at the trial, the verdict is only for plaintiff on the part confessed, but jury neglect to assess damages thereon, a writ of inquiry will be afterwards allowed. *Townsend v. Pool*, Bar. 228.

So if the issue be not well joined, and a mis-trial has been had, and thereupon a motion is made in arrest of judgment; yet if the defendant's plea amounts to a confession, though the verdict be void, the court will give judgment upon his confession, and grant a writ of inquiry to ascertain plaintiff's damages. *Lacy v. Reynolds*, Cro. Eliz. 214. *Jones v. Bodines*, Carth. 370. where the form of the special entry on the roll in that case may be seen.

Although judgment be arrested for mis-trial or the like.

Wherever a party binds himself in a penalty for the performance of covenants, and an action is brought thereon, the plaintiff must proceed according to the stat. 8 & 9 W. 3. c. 11. f. 8, which is now held to be compulsory; and therefore, if defendant lets judgment go by default, plaintiff must suggest the breaches upon the roll, and issue a writ of inquiry as therein directed; the jury upon this writ is, by the statute, to be summoned before the justice of assize or *nisi prius*. *Roles v. Rosewell*, 5 D. & E. 538. *Hardy v. Bern*, Ib. 636.

How plaintiff to proceed in actions on penalty for non-performance of covenants.

Where there is a demurrer to part, and judgment by default as to residue, plaintiff may either proceed with demurrer first, or may sue out his writ of inquiry, and assess contingent damages, in case judgment should be for him on the demurrer; but if there is an issue of fact, as *non assumpsit* to the whole, and also another plea of *non assumpsit infra sex annos*, to which an original is replied, and issue on *nul tiel record* thereon found for plaintiff, he cannot execute inquiry thereon, till he has tried the first issue of *non assumpsit*. *Prior v. Isley*, Bar. 229.

Where there is a demurrer and judgment by default, or an issue on such judgment:

So if there be a demurrer to one count, and an issue on the other, plaintiff may carry down the issue to trial first, and sue out a *venire, tam* to try the issue, *quam* to inquire of the damages on demurrer, and in that case, the jury gives contingent damages; or he may waive the issues in fact, and take out inquiry upon judgment, when obtained on demurrer; but in entering final judgment, he must enter a *non pros* on the roll, as to the issues in fact, or it will be error. *Fleming v. Langton*, Str. 532.

or issues in law and facts

But if, in the first case, on trial of the issue, plaintiff be nonsuited, no contingent damages shall be assessed. *Snow v. Como*, Ib. 507.

So if, in a joint action of trespass, three plead, and three let judgment go, the *venire* may issue *tam ad triandum, quam ad inquirendum*, and the same jury at the trial will assess the damages against the defaulters, and this though the three who pleaded should be acquitted. *Jones v. Harris*, Str. 1108. For further observations on this head, see Vol. I. Ch. 8. (C).

or some defendants plead and others suffer judgment.

(C. 2) *Of the Notice of Inquiry.*

What notice
necessary.

If the venue be in London or Middlesex, and defendant lives within 40 miles of London, eight days; but if he lives above 40 miles from London, fourteen days notice, exclusive, must be given.

In all cases, where the writ is executed in the country, eight days notice, exclusive, is sufficient, Mich. 1654. *Milbourn v. Stephenson*, 1 Barn. 110.; for the statute 14 Geo. 2. c. 17. which requires ten days notice of trial at the assizes, does not extend to notices of inquiry. Tid. 320.

Where no proceedings have been had for a year, there must be a term's notice, the same as in cases of notice of trial. *Payton v. Burdus*, Str. 1100. See *ante*, Vol. I. Ch. 9. Sec. 2.

Two days notice is sufficient, when *short* notice only is required. *Butler v. Johnson*, Bar. 301.

The following rules will shew how anxious the courts have been to expedite justice and prevent delay:

Rules of court
as to the time
from which
such notice is to
be reckoned.

Whereas by a rule of this court, made in Trinity term in the second year of the reign of his majesty king George, it was ordered; "That in all cases, where the plaintiff concludes *ad patriam*, the defendant's attorney, or clerk in court, shall be bound to accept of notice of trial upon the back of the pleading, whether the same be delivered to the defendant's attorney or agent, or left in the proper office, where the same may be left by the course of the court. And such notice of trial so given or left as aforesaid, shall be as good and effectual as if issue had been actually joined."

"And whereas it appears, that notwithstanding the said rule, the plaintiffs, in divers actions and suits commenced in this court, are delayed; for that the defendant's attorneys are not obliged to take the like notice of executing writs of inquiry:"

Where plaintiff
concludes to
the country and
defendant ne-
glects to join
issue.

It is therefore hereby ordered, That in every cause where the plaintiff concludes *ad patriam*, and giveth notice of trial upon the back of his pleading, pursuant to the said rule, if the defendant doth not join issue on such pleading, before the rule be out, that in every such case, after judgment obtained, the defendant's attorney shall be obliged to accept notice of executing a writ of inquiry, from the time that notice of trial was given on the back of such pleading as abovesaid. R. Hil. Term, 6 Geo. 1. 1719.

"And whereas the above rules have by experience been found to be of great use and advantage to plaintiffs, for
" the

" the more speedy recovery of their just debts; but no provision being made in cases where defendants *demur* to the plaintiff's declaration, and by that means give great delays to plaintiffs; because, by the said rules, defendants are not obliged, till after judgment obtained, to accept of notice of executing a writ of inquiry:"

It is therefore now ordered by this court, That in all cases where the defendant demurs to the plaintiff's declaration, the defendant's attorney, or clerk in court, shall be obliged to accept of notice of executing the writ of inquiry on the back of such joinder in demurrer. And in case where the defendant pleads such a dilatory plea, that the plaintiff is obliged to demur to, that in such a case, the defendant's attorney, or clerk in court, shall be obliged to accept of notice of executing a writ of inquiry on the back of such demurrer. R. Trin. Term, 10 Geo. 1. 1724.

Where defendant demurs to declaration;

or pleads a dilatory plea to which plaintiff demurs.

" Whereas great delays often happen to plaintiffs in their suits in this court, by reason of demurrers in law by the defendant's attorney, after the plaintiff hath tendered the issue to be tried by the country, upon the plea of the said defendant pleaded, and hath delivered paper-books with notice of trial, according to the course of this court; so that after judgment obtained by the plaintiff upon such demurrer in law, there is not sufficient time to give notice of executing a writ of inquiry of damages, within that term in which the judgment shall be so obtained:"

Therefore it is ordered for the future, That in every case, where the plaintiff shall conclude to the country upon the defendant's plea, and shall give notice of trial of the issue upon the paper-book as aforesaid; and thereupon the defendant, to hinder the trial of the issue, shall demur in law to the replication or plea of the plaintiff, and the plaintiff shall join in such demurrer, and thereupon shall obtain judgment; the attorney for the defendant shall be obliged to accept of notice of executing a writ of inquiry of damages, from the time of notice of trial given upon the paper-book as aforesaid. R. Hil. Term, 8 Geo. 1. 1721.

Where defendant strikes out similitur and demurs to replication;

Where issue is joined upon any special pleading, and the paper-book is made up and delivered with notice of trial, if the defendant return the book with a demurrer, having struck out the pleadings subsequent to that to which he demurs, and judgment be given for the plaintiff upon the demurrer, he may, by the above rule, execute his inquiry, giving only so many days notice thereof (*i. e.* of the hour and place of executing it) as would have been sufficient,

or returns paper-book with demurrer, having struck out any other pleadings.

had

had such notice been given when the paper-book was delivered with notice of trial. Notes on Rules, edit. 1795, p. 214.

How it should be given and what it should contain.

Notice of executing inquiry should be in writing, and drawn with a sufficient degree of certainty: 1st, As to the time when it is to be executed.

What certainty as to time of executing inquiry.

Some hour should be mentioned. *Gutton v. Hall*, 1 Barn. 139.

Or it will be bad, though defendant said he would make no defence. *Langstaff v. Lamb*, Bar. 293.

The notice should express that the writ will be executed between two certain hours. *Arnold v. Squire*, Say. 181.

If beyond that time, as between ten and two, held irregular. *Foster v. Smales*, Bar. 295. *Robinson v. Philips*, lb. 296. *Le Marque v. Newman*, Com. 551.

Notice to execute inquiry by ten o'clock, held bad. *Isom v. Fowen*, Str. 1142.

So at ten, or as soon after as sheriff can attend. *Hannaford v. Holman*, Bar. 295.

Though a notice to execute writ at eleven was held regular, as it appeared to be executed before twelve. *Last v. Denny*, Bar. 302.

How that time is to be adhered to.

But when notice is given of the execution of a writ of inquiry within a certain time, it is never understood that the time is scrupulously adhered to. The sheriff may have prior business that may last beyond the hour. If the defendant's attorney, therefore, leave the place immediately after the hour is past, it will be deemed a trick, and though inquiry should be afterwards executed, it will be held regular. In one case court said the party should have stayed an hour after the time mentioned for executing it. *Anon.* 2 Barn. 214. *Williams v. Frith*, Doug. 198.

But the party is expected to attend punctually at the time, for if he be too late and writ be executed, it is his own laches, and cannot be cured, unless it is manifest sheriff began to execute it before the time. *Beetknife v. Sir Herbert Packington*, 1 Barn. 233.

What certainty as to place of executing inquiry.

2d, The notice should be certain as to place of executing inquiry.

The sign of the house should be mentioned, *Arnolds v. Squire*, Say. 181. and the street; and if more streets of that name than one, it should be particularized, *Le Marque v. Newman*, Com. 551.; and the county, *Lower v. Smith*, Bar. 300. Even where the notice was to execute writ at sheriff's office at Northampton, it was held ill; no sign or particular house being mentioned. Com. 551. Bar. 297. So at Westminster,

Due engrossed left at such w
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minister, generally, held bad. *Kinch v. Hasine*, Prac. Reg. 447.

3d, The notice should be correct also as to the names of the parties. *Nash v. Harrow*, Bar. 310.

If the inquiry is to be executed before a judge, the notice expresses no time, but is general for the sittings or the assizes, as the case may be; the day and hour is left to the judge's discretion.

Rule to execute inquiry before a judge was made absolute the last day of term, though rule *nisi* had only been served on that day.

In this case, notice had been previously given to execute writ before the sheriff, afterwards fresh notice was served to execute it before the judge; there were not eight days between the fresh notice and time of executing it, but it was held well; for as it was not executed till after the time for executing it before the sheriff had elapsed, party could not be damnified. *Perry v. Cortisfoes*, 2 Barn. 122.

If plaintiff appears for defendant and signs judgment for want of a plea, he may give notice of executing inquiry to defendant himself, or leave the same at his last place of abode; but if defendant has appeared by attorney, notice to defendant himself is bad; it must be served on his attorney or his agent, *Mosely v. Sanford*, Bar. 311. and so in general where the attorney or agent is known. *Higgins v. Stewart*, Prac. Reg. 276.

Notice of executing inquiry in a country cause may either be given to the agent in town, or the attorney in the country. *Smith v. Lacock*, Bar. 305. *Tasburn v. Havelock*, Ib. 306.

In a joint action notice should be given to both defendants. *Kingdom v. Herne* and another, Prac. Reg. 443.

Notice of executing inquiry may be continued and countermanded in the same way, and subject to the same rules as notices of trial; for which, see Ch. 9. Sec. 2.

Notice of continuance must be served two days before execution of writ, and can only be once continued. *Price v. Bambridge*, Bar. 297.

Notice of countermand must be *six* days, if a country cause, or if a town one and defendant lives above 40 miles from London; but otherwise, *two* days.

What certainty as to the names of the parties.

Certainty as to time not necessary if writ to be executed before a judge.

Of such notice after notice given to execute before the sheriff.

How notice to be served, and on whom.

When to the party, and when to the attorney.

Of continuing and countermanding the notice.

(C. 3) Of the Execution of Inquiry, &c.

(C. 3)

Due notice having been given, and the writ of inquiry engrossed and prepared as before directed, it should be left at the sheriff's office the day before the execution; such witnesses as are required, if unwilling to attend, may

Of the execution of the writ in pursuance of the notice.

be compelled by a subpœna, which should be procured for that purpose; and if either party wishes to attend by counsel, notice thereof should be given, or it will not be allowed in costs.

Where and by whom to be executed.

It should be executed in the same county where the *venue* is laid.

Sheriffs or under-sheriffs ought to execute writs of inquiry; and if the latter appoint deputies for that purpose, they will be liable to an attachment. *Wallace v. Humes*, Bar. 231.

Unless such deputy be appointed by deputation under the seal of the sheriff's office. *Davis v. Skyllins*, Bar. 232.

But where the writ was directed to the coroners of N. and they verbally appointed a person to execute it, the appointment was held no authority; but court refused to set aside inquisition, because defendant attended execution. *Dixon v. Goodman*, Bar. 413.

An inquisition taken before two under-sheriffs extraordinary held bad, the sheriff can only appoint one. *Denny v. Trapnell*, 2 Wil. 378.

If the sworn under-sheriff live in the same town, it ought to be executed before him. *Ib.*

Before what jury.

It should be executed before a proper jury; for this reason, it is ordered to be left at the sheriff's office the day before execution: formerly it was to be left two days before, but afterwards altered to one. R. Hil. 23 G. 3.

The jurymen were debtors taken out of prison: and though the party attended, inquisition was set aside, and conduct of sheriff reprimanded; but there is no objection to their being javelin-men. *Stainton v. Beadle*, 4 D. & E. 473.

Inquisition set aside, because the jury was returned by the attorney for plaintiff. *Baylis v. Lucas*, Cow. 112.

Inquiry executed before fourteen jurors instead of twelve, held good; for it is but an inquest of office, whereon no attain lies. *Chester v. Crowley*, Str. 1159.

How, if before a judge.

Sometimes the writ is executed before a judge; in which case, he is only an assistant to the sheriff, and has no judicial power; and if the parties come to an agreement there, the way to make it effectual is to bring it to him to sign, and afterwards move the court to have it made a rule of court. 12 Mod. 610.

On what day.

Writ of inquiry may be executed on the return-day. *Dyke v. Blackston*, Ld. Ray. 1449.

But not on a Sunday. *Hoyle v. Lord Cornwallis*, Str. 387.

And if return-day be on Sunday, it is too late to execute it the day after. *Stanton v. Winch*, Cal. Prac. C. B. 85.

When

When a defendant suffers judgment to go by default, he admits the cause of action. Wherever the demand is uncertain, as for money had and received, goods sold, or the like, the plaintiff must prove the debt before the jury; but where the amount appears on the face of the record, as upon promissory notes, bills of exchange, or the like, the defendant admits that he is liable to that amount; the note or bill, therefore, need not be proved; but they ought to be produced on executing writ, to see whether or not any part has been paid. *Green v. Hearne*, 3 D. & E. 302.

What evidence should be given.

Of producing bills, notes, &c.

In calculating interest or damages in general, the jury should only allow up to the time of bringing the action, not of executing the writ. *Holdess v. Cornwall*, 1 Barn. 44. *Baker v. Bache*, Ld. Ray. 1382.

Of calculating interest and damages.

Though Holt C. J. in action of covenant for not repairing, held that case not to come within the rule, and that jury did right in finding damages for the premises having become worse since the action. *Shortridge v. Lamplugh*, Ld. Ray. 803.

The jury must find some damages for plaintiff; but even if they find for defendant, plaintiff, if he moves to set it aside, must pay costs. *Daniel v. Packhurst*, 2 Barn. 215. 223.

What damages should be found.

Though the damages be small, the inquisition may stand, and in general the court will not interfere on behalf of plaintiff, except it be obviously unjust, or the jury or sheriff mistook in point of law. *Hayward v. Newton*, Str. 940. *Woodford v. Bades*, Str. 425. *Burges v. Nightingale*, Bar. 230. *Budicome v. Jones*, 1 Barn. 107. *Tutton v. Andrews*, Bar. 448.

Especially if it be an action for a tort. *Mauricet v. Brecknock*, Doug. 309.

If the damages be excessive, defendant may move the court to set aside inquisition; but it should be a strong case for court to interpose. *Bruce v. Rawlins*, 3 Wil. 61. *Yate v. Swain*, Bar. 233.

If damages exceed the sum laid in declaration, and judgment be entered accordingly, it will be error. *Chevely v. Morris*, Black. 1300. *Baker v. Bache*, Ld. Ray. 1382.

But plaintiff may enter a remittitur for surplus, and cure the defect. *Strawn v. Fletcher*, 2 Bar. 344.

If the sheriff, on execution of writ, admits improper evidence, the court will set aside inquisition. *Tutton v. Andrews*, Bar. 448.

Of sheriff admitting improper evidence.

Or if plaintiff produces no evidence, and yet jury gives damages. *Hill v. Martin*, 1 Barn. 33. *Ellis v. Wall*, Bar. 234.

Of the jury severing the damages in joint actions.

Where two or more defendants suffer judgment by default in an action of trespass, the jury cannot sever the damages, and find so much against one and so much against the other. *Onslow v. Orchard*, Str. 422.

But if one demurs and the other suffers judgment, damages may be severed, because they have severed in their plea. *Chapman v. House* and others, Str. 1140.

Execution of writ may be adjourned.

Execution of writ of inquiry may be adjourned, after it is entered upon; and it is the duty of the sheriff, in particular cases, to adjourn, as where any material witness on part of plaintiff is unexpectedly absent, or where any witness obstinately refuses to give evidence, or plaintiff is taken by surprise with any new defence to lessen his demand. *Coleman v. Marvhey*, Str. 853. *Markham v. Middleton*, Ib. 1259. *Mauricet v. Brecknock*, Ib. 509. *Hall v. Stone*, Ib. 515.

But in such cases of adjournment, plaintiff ought to pay the costs.

Of altering writ of inquiry before execution.

If a writ of inquiry be altered and re-sealed before the return thereof, and before it has been made use of, and afterwards executed according to due notice, such alteration shall not vitiate it. *Langley v. Bothwright*, Bar. 232.

Of defendant's costs if inquiry not executed.

If the writ of inquiry be not executed pursuant to notice, the defendant is entitled to his costs in both courts, in the same way as he is, if plaintiff does not proceed to trial according to notice. *Sutton v. Bryan*, K. B. Str. 728. *Kettle v. Bromsall*, C. B. Bar. 230.

Of the return of writ of inquiry.

The writ of inquiry must be returnable as the original proceedings are, whether on a general return-day, or a day certain; but should it be made otherwise, it is not an irregularity, but error; so that no advantage can be taken thereof, by motion to set aside the inquisition. *Elmes v. Tomlinson*, Bar. 230.

And even this error is now helped by the statute of jeofails, as it is only held to be a miscontinuance. *Coupland v. Frinlow*, Say. 245.

So the want of a writ of inquiry after judgment by default, is aided by the 4 & 5 Ann. c. 16. and not error. *Iles v. Pitt*, Ld. Ray. 1397.

Of suing out a second writ.

If a second writ of inquiry issue pending the first, and before it is returned and quashed, inquisition thereon will be set aside as irregular. *Bunting v. Teisdale*, Bar. 231.

(D)

(D) Of setting aside Inquisition, arresting Judgment, and amending the Proceedings.

What to be done on the return of writ.

On the day of the return of inquiry, the plaintiff gives a rule for judgment with the clerk of the rules; it expires in

in four days; Sunday, or any holiday on which the court does not sit, is not reckoned.

Within these four days, defendant may move to set aside the inquisition for any irregularity, whether it be in the writ itself, or the notice, or the execution of writ, or the like; but it is to be observed, that the courts will not countenance frivolous objections; that they are anxious to expedite the substantial justice of the case; and always lean against motions made only for delay. See the causes for which inquisition will be set aside, *post*. tit. New Trials.

Motions to set aside the proceedings should be made in the first instance, as soon as the parties are aware of the irregularity, and can apply to the court; and if, by their subsequent conduct, they have done any thing that can be construed as a waiver of the irregularity, it cures it.

Thus any defect in the notice, or the like, will be cured by the party or his attorney attending the execution of inquiry. *Yate v. Swaine*, Bar. 233.

So if there be any error on the declaration, if defendant means to move in arrest of judgment, he must not attend execution of inquiry; but must rely on the defect, and move the court that interlocutory judgment be forthwith entered upon the record, agreeable to declaration delivered, and the roll be brought in to the proper office, and that defendant may have four days to move in arrest of judgment, after the roll is brought in. *Freeland v. Hunt*, 2 Wil. 380.

Not only the motion in arrest of judgment, or to set aside inquisition, must be made within the four days above-mentioned, but also any application which defendant has to make to the court must be made within that period.

Thus it is too late afterwards to move to enter a suggestion on the record, to save plaintiff costs, or the like. *Barney v. Tubb*, 2 H. Blac. 356.

Writ of inquiry executed on the 5th, final judgment may be entered the 9th; and *per* Buller J. even if the writ of inquiry be executed on the last day of the term, plaintiff has a right to sign his judgment as of that term. *Ib.* 356.

But it is here observable, that if the plaintiff moves to set aside the inquisition, as on the ground of an evident miscalculation of the debt or damages by the jury, or the like; as this is in his own delay, he may make the application after the four days, if final judgment has not been entered up. *McCulloch v. Wilcox*, K. B. Mich. 1796.

A writ of inquiry is amendable; for there is the roll by which it may be amended. *God.* 79.

The writ should pursue the declaration; but if any variance, court will give leave to amend by the record, on

A a 3

payment

Of moving in arrest of judgment or to set aside inquisition.

When to be moved.

How defect cured by party attending.

All applications must be made within 4 days.

When plaintiff may sign final judgment.

Of amending writ of inquiry or the proceedings thereon.

payment of costs. *Condren v. Coubter*, Cas. Tem. Hard. 314.

One of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both; after this, and after a motion to set aside proceedings for irregularity, the court permitted plaintiff to suggest on the roll, the death of the deceased plaintiff, and to amend the *ca. fa.* without paying costs. *Newnham v. Law*, 5 D. & E. 577.

So rule granted to strike out one of defendants' name, and make the writ tally with inquisition. *Ingbam v. Chiswell* and another, Bar. 15.

In judgment by default, the plaintiff is to make up the whole record; but if error is brought for a slip, in not making proper entries for the defendant, judgment shall stay till application to amend be made below. *French v. Cornelys*, Blac. 453.

Where writ of inquiry was executed, and no judgment entered up, and the writ was afterwards lost, a new writ and inquisition was ordered, upon motion, to be made out, according to the sheriff's notes, and costs to be indorsed by the Master, as appeared to have been before taxed by the commitment-book. *Bean v. Elton*, Str. 1077.

How to proceed if plaintiff in the action becomes bankrupt.

The bankruptcy of plaintiff does not abate the suit; if plaintiff, therefore, becomes a bankrupt, writ of inquiry may be awarded and executed, and final judgment entered up, and execution sued out in his own name, without any *scire facias* by the assignees. *Bibbins v. Mantel*, 2 Wil. 358. 372. *Waugb v. Aussen*, 3 D. & E. 437.

In what cases plaintiff cannot have final judgment against defendants who have suffered.

Although letting judgment go by default is, generally speaking, a confession of the action; yet, in some cases, where a defendant suffers such judgment, and damages are found against him, upon execution of inquiry, the plaintiff cannot have execution for such damages, but judgment will be arrested.

In joint actions.

Thus, in all joint actions against two or more defendants, where one pleads, and the other lets judgment go by default; if such plea goes to the whole cause of complaint, and be found, upon trial, for defendant, and the nature of the action be such, that the justification of the one defendant necessarily takes away plaintiff's cause of action against the other; plaintiff shall not reap any benefit from his interlocutory judgment against such other defendant.

Difference between joint actions, on contract and tort.

This is the case in all joint actions against defendants upon any contract, as *assumpsit*, debt, covenant, and the like, where the demand is joint, and one cannot be convicted without the other; but not so in actions upon a tort,

as trespass, or the like; for there one defendant may be guilty, and the other not: but even in trespass, if the justification of defendant be of a nature necessarily to destroy plaintiff's cause of action against all, no judgment can be against the other defendant, though he is found guilty.

Biggs v. Bengier and another, *Ld. Ray.* 1372.

If three defendants, in a joint action of trespass, suffer judgment by default, and the plaintiff executes writs of inquiry against them separately, and takes several damages against them, it is irregular; and if the plaintiff enter up final judgment with those several damages against the defendants, it would be erroneous: but the court will permit the plaintiff to set aside his own proceedings before final judgment, on payment of costs. *Mitchell v. Milbank* and others, 6 D. & E. 199.

After verdict on writ of inquiry, as after verdict upon issue joined, plaintiff cannot discontinue the action without defendant's consent. *Stephens v. Etherick*, *Carth.* 86.

Of discontinuing after verdict on inquiry.

SECTION III.

Of Judgment of Non Pros.

If plaintiff does not comply with the rules and orders of the court to be observed on his part, by declaring, replying, surrejoinder, or entering the issue in due time, when ruled so to do, judgment of *non pros* for such his omission may be signed, which is final.

Get a roll, enter thereon warrant of attorney for defendant only; ingross *non pros* thereon; also ingross same on a double 2s. 6d. stamp paper, and carry it to clerk of judgments in B. R.—prothonotary in C. B. who will sign same,—pay 3s.

Get costs taxed, and sue out execution, or bring an action for the same, which may be done though under 40s.

K. B.

By a rule of court Michaelmas 1654. *Sec.* 15.

If the plaintiff declares not the second term, though the defendant give no rule, yet a nonsuit may be entered at the end of the second term, upon a continuance over by him dies datus, but not the third term or after.

And by stat. 13 Car. 2. *st.* 2. c. 2 *sec.* 3. That upon appearance

to

C. B.

The same rule as in K. B. was also made in this court, Michaelmas 1654. But the practice here is now governed by a subsequent rule of Hil. 9 Ann.

Upon all process returnable, the first or any other return in any term, the plaintiff shall have liberty to the end of the next ensuing term to deliver his declaration to the defendant's attorney, or of leaving

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Of signing non pros for want of declaration.

the

to be entered in the term wherein the writ or process is returnable, unless the plaintiff declare before the end of the term next following after appearance, that then a non-suit for want of a declaration may be entered against him, and defendant shall recover his costs.

If the action be by original, defendant may sign non pros any time before effoin day of third term without a rule to declare, having entered appearance of the term writ is returnable. Imp. K. B. 508.

the same in the office; and defendant's attorney having entered his appearance with the proper officer as of that term in which the process is returnable, and at the end of the ensuing term, or in four days after the end thereof, having given a rule to declare in the proper office, (it is a rule with the secondary which expires in four days,) and having called on the plaintiff's attorney or clerk in court, (if he can be found,) the defendant, any time in the vacation of such ensuing term after the rule for declaring is out, may sign his non pros for want of a declaration and not afterwards; and the plaintiff shall not, without leave of the court, have any longer time to declare in than as above said, other than the time to be limited by the defendant's rule.

Defendant, by the above rule, must sign judgment of non pros for not declaring in the vacation after second term; he cannot wait till the third time. Towers v. Powell, 1 H. B. 87.

The above statute of 13 Car. 2. which enables the defendant to sign a non pros, is not confined to cases of defective writs, which are mentioned in the preamble of the statute, but extends to all cases in general. *Oldham* and another v. *Burrell*, 7 D. & E. 26.

If not signed, declaration may still be delivered.

By the general rule of law, a plaintiff must declare within twelve months after the return of the writ, or he will be out of court. But by the rules of the courts, if he do not deliver his declaration within two terms, defendant may sign judgment of non pros: If, however, no such judgment be signed, plaintiff may still deliver his declaration at any time within the year. *Worley v. Lee*, 2 D. & E. 112. *Penny v. Harvey*, 3 D. & E. 123. *Sherjon v. Hughes*, 5 D. & E. 36.

The defendant having surrendered in discharge of his bail in K. B. removed himself by *habeas corpus* to the Fleet, and plaintiff declared against him there, after the end of the second term after the writ was returnable. A judgment of non pros signed afterwards was irregular. *Sherjon v. Hughes*, 5 D. & E. 35.

If treaty of compromise, plaintiff need not declare.

But if there be a treaty between plaintiff and defendant, he is not obliged to declare within that time. *Walker v. Steward*, 3 Wils. 455.

If a man appears at the day of the return of the process, and puts in bail, though he never was arrested, nor the process returned; yet if plaintiff does not declare within two terms, a *non pros* may be signed. Salk. 456.

How if plaintiff appears without arrest or service of process.

In both courts, it seems necessary that common bail should be filed, or an appearance entered within the term in which writ is returnable, or defendant cannot sign *non pros* for want of declaration.

When common bail must be filed to warrant a *non pros*.

See Rules above, and *Holmes v. White*, K. B. East. 11 G. 3. Imp. K. B. 508.

For this reason, a prisoner, when superseded on filing common bail, cannot sign judgment of *non pros*, as he is not entitled to his *superfedeas* till after the second term.

But there seems to be a difference in the practice of the courts, with respect to giving the plaintiff a rule to declare before *non pros* signed; in K. B. no such rule is necessary, but in C. B. it is.

When rule to declare necessary to warrant *non pros*.

So that in B. R. plaintiff has only to the end of the second term to declare in, whether called upon by rule or not; but in C. B. he has till the effoin-day of the third term, if not called upon by rule. P. R. 121. *Steward v. Harding*.

And rule to declare must be given at the end of second term, or within four days after. *Allen v. Milward*, Hil. 30 G. 3.

And at what time to be given.

Giving rules to declare, and calling for declaration, are as necessary in signing a *non pros* in C. B. as giving rules to plead, and calling for plea, are necessary before signing judgment for want of plea in B. R.

But where the plaintiff does not declare, after having obtained time for that purpose, the defendant, at the expiration of such time, may sign judgment of *non pros*, without giving any rule to declare; upon the same principle as where time to plead has been given, no rule to plead is necessary. *Towers v. Powell*, 1 H. Bl. 87. And if the time to declare had been till the last day of Trinity Term, the defendant might in the vacation sign judgment of *non pros* of Trinity Term. Ib.

Not necessary if plaintiff has had time to declare.

If a rule to declare be given, in C. B. it is sufficient; there is no occasion for a demand of declaration.

Demand of declaration when necessary to warrant *non pros*.

The plaint in replevin being removed into this court by *re. fa. lo.* and defendant having given a rule to declare, he may sign judgment of *non pros*, for want of declaring without demanding a declaration. *James v. Moody*, 1 H. Bl. 281.

Though declaration be filed in office, yet if no notice thereof be given within two terms, defendant may sign *non pros*.

Notice of declaration necessary.

pros, provided he has done nothing to waive the notice.
Anon. 1 Barn. 362.

Of non *pros* for
 not replying &c.

For not enter-
 ing issue, and
 what defendant
 must do before
 non *pros* signed.

Plaintiff may also be nonsuited at any other stage of the cause, as for not replying, surrejoining, or entering the issue, when ruled so to do. But if defendant sign judgment of *non pros* for not entering issue, he must do it immediately on expiration of the rule so to do; otherwise, if the roll be brought in afterwards, before such judgment actually signed, the judgment will be irregular. Therefore the defendant is bound to search in the office, whether the plaintiff has brought in the issue-roll, immediately before he signs judgment of *non pros*, even though he may have searched the day before, upon the expiration of the rule to bring in the roll. *Minus v. Baxter*, 1 D. & E. 16.

But see the case of *Thompson v. Ryall*, 4 D. & E. 195. also see *ante*, Ch. 7. Sec. 9.

Of a non *pros* in
 a joint action
 against several
 defendants.

In a joint action against two or more defendants, plaintiff cannot be *non proffed*, unless by all the defendants. *Doug.* 169. *Powell v. White* and others. So though two writs be served, four defendants in one writ, and three in the other: nor can they sign distinct and several judgments of *non pros*; but if plaintiff does not proceed against them, one judgment can only be signed against him. 4 Burr. 2418. *Pryce v. Foulkes* and others.

How if they ap-
 pear severally;

And although they appear severally by separate attorneys, yet there must be but one joint judgment of *non pros*. Com. 74.

or plead sepa-
 rately.

Or if plaintiff declares against them jointly, and they sever in their pleas, one cannot enter a *non pros*, for by a *non pros* plaintiff is out of court as to all the defendants, which is the material difference between a *non pros* and a *noll pros*. *Powell v. White*, *Doug.* 169.

How if plaintiff
 declares seve-
 rally against
 them.

But the above rule only holds where the action is a joint action against them all, for wherever it can appear to be his intention to proceed against the defendants separately, judgment of *non pros* may be signed by all or any of the defendants named in the writ, if not duly proceeded against. *Butler v. Upton*, 2 D. & E. 258.

Thus if plaintiff declares against one of two defendants named in his writ, and does not proceed against the other, the latter may sign *non pros*.

So if plaintiff serves notice of declaration, or takes out a rule for time to declare against one only, and does not proceed against the other. *Roe v. Cock*, 2 D. & E. 257.

Of non *pros*
 when cause re-
 moved by ha-
 beas corpus.

If defendant removes a cause by *habeas corpus* into B. R. he cannot have a *non pros* for want of a declaration, for plaintiff is not bound to follow him, but he must declare in two terms. Imp. K. B. 469.

No *non pros* can be signed pending an injunction, nor after outlawry reversed; but if the plaintiff does not declare within two terms after outlawry reversed, the defendant may give a rule to this effect, viz. That unless the plaintiff declare in the cause within four days after notice of the rule to him or his attorney given, he shall pay to the defendant or his attorney, costs to be taxed by the prothonotary. See the Rule Trin. 33 Car. 2.

How pending an injunction;
or after outlawry.

In B. R. the plaintiff's attorney was summoned before a judge to produce his client; and the judge made an order that unless he produced him within a month, the defendant should, by consent, be at liberty to sign a *non pros*. He did not produce him within a month, and the *non pros* was signed; and on affidavit made that no such man as the plaintiff could be found, the court, on motion, made a rule upon the attorney to pay the costs; and afterwards, upon an affidavit that they were demanded and unpaid, the court granted an attachment against him. *Gynn v. Kirby*, Stra. 402.

If plaintiff's attorney does not produce his client, court will sometimes order a *non pros*.

When a judgment of *non pros* is signed, plaintiff becomes liable to pay defendant the costs he has been put to *pro falso clamore*. An action of debt may be brought against him for such costs.

Of costs of *non pros*.

Executors and administrators pay costs upon being *non proffed* for want of declaring in due time. 4 Burr. 1584.

As to executors, &c.

Where a defendant removes proceedings by *re. fa. lo.* from a country court into one of the superior courts, and signs judgment of *non pros* in default of plaintiff's appearing, he is entitled to costs.

When plaintiff removed by *re. fa. lo.*

Not indeed under stat. 13 Car. 2. st. 2. c. 2. because that act is confined to actions commenced in the superior courts; but under 4 Jac. 1. c. 3. whereby in all cases wherein a party is entitled to his judgment, he is entitled to his costs. *Davis v. James*, 1 D. & E. 373.

Of explanation of 13 Car. 2. & 4 Jac. 1.

Whether plaintiff, after a *non pros*, may hold defendant to bail again for same cause of action, see *ante*, Ch. 2. Sec. 1. (F)

Of holding defendant again to bail after *non pros*.

If a *non pros* is signed irregularly, plaintiff may proceed to judgment.

How if a *non pros* signed irregularly.

Defendant pleaded a tender, but brought no money into court; he gave a rule to reply, and for want of a replication signed judgment of *non pros*. Plaintiff looking on the plea as a nullity for want of the money in court, signed judgment after the *non pros* obtained, which the court held to be regular, and set aside the *non pros*. Barn. 252.

A *non pros* may be set aside for irregularity on affidavit of facts.

How to be set aside.

The court refused to set aside a *non pros* regularly obtained by defendant against plaintiff, who was only a common informer,

Refused in a *qui tam* action.

former, though the plaintiff offered to pay the costs. Had the plaintiff been the party really injured, it might have borne a different consideration; but the court would not exercise their discretionary power, when the plaintiff was merely a common informer. *Bennet v. Smith*, Burr. 401.

Set aside where demand of declaration was of country attorney.

Motion was made to set aside a *non pros* signed for want of a declaration, which had been demanded of plaintiff's attorney in the country, and not of the agent in town. It was, upon shewing cause, sworn, that the plaintiff's attorney in the country agreed it should be regular. *Per cur.* Let the *non pros* be set aside. No agreement of country attorneys can vary the practice of the court. All transactions of this kind must be in town. Bar. 311.

If an action be brought upon a judgment of *non pros* which was irregular, there should not be two rules, one to set aside the judgment, and another to set aside the proceedings in the action; but the whole may be set aside in one rule. *Barlow v. Kaye*, 4 D. & E. 638.

SECTION IV.

Of Judgment as in Case of a Nonsuit.

- (A) The Nature, Meaning, and Origin thereof.
- (B) When to be moved for.
- (C) How to be moved for.
- (D) What Excuse sufficient, and of the peremptory Undertaking.
- (E) In what Cases such Judgment allowed.
- (F) Whether Defendant can have such Judgment, and also have Costs for Plaintiff's not proceeding to Trial.

- (A) (A) The Nature and Meaning of such Judgment.

For the nature, meaning, and origin of the motion for judgment as in case of a nonsuit, see *post*, tit. Of carrying down the record by proviso.

- (B) (B) When to be moved for.

In K. B.

C. B.

At what time defendant must

The plaintiff is not bound to give notice of trial till the term after

The defendant cannot apply for judgment, as in case of a nonsuit, before

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after that in which issue is joined.
Hall v. Buchanan, 2 D. & E.
734.

So that if issue be joined early enough in a term to enable the plaintiff to give notice of trial for the sittings after that term, he is not obliged to do so, nor is the defendant entitled to judgment as in case of a nonsuit, for not proceeding to trial, unless the plaintiff has in fact given notice of trial. Hunt v. Tremamando, 4 D. & E. 557.

But if he does give such notice and not proceed, defendant is entitled to judgment.

So, if notice of trial is given, and afterwards countermanded, plaintiff ought to give fresh notice to proceed next term; or the term after judgment may be moved for.

If an issue be joined in Trinity term, and delivered in a country cause with notice of trial for the then next assizes; if the plaintiff does not try his cause, the defendant may move for judgment as in the case of a nonsuit in Michaelmas term (although he compel the plaintiff by rule to enter his issue in that same Michaelmas term).

If an issue be delivered so late in a country cause that the plaintiff could not give notice of trial as of Trinity term, then the defendant cannot move for judgment as in the case of a nonsuit, until Easter term following (his default not happening till Lent assizes).

before the third term after that in which issue is joined. If issue joined in Trinity, he cannot apply till Hilary term; nor will an application in Michaelmas term do, though after it is too late for plaintiff to give notice of trial in that term. Da Costa v. Ledstone, 2 H. Bl. 558. This seems contrary to the Reporter's query in a note to Baker and Newman, 1 H. Bl. 123. and also to the case of Frampton v. Payne, 1 H. Bl. 65.

give notice of trial after issue joined in K. B. and C. B.

(C) How to move for Judgment as in Case of Nonsuit.

(C)

First, get rule for plaintiff to enter his issue, if it be not already done, for which see *post*. Ch. 9. Sec. 1.; if he does not comply with rule, sign judgment of *non pros*; otherwise, when the issue is entered, proceed as follows:

Make affidavit of the term when issue was joined, or notice of trial given, or the like, and that plaintiff did not proceed in pursuance thereof; or as the fact may be.

K. B.

K. B.

Give it to counsel with 10s. 6d. and remember to have your roll in court; or if you are at Westminster before the sitting of the court, Mr. Austin will mark it in the treasury "read;" pay 1s. 6d. in the evening; draw up your rule, pay 6s.; serve copy on plaintiff's attorney, make affidavit of the service; give it to counsel with one guinea to make it absolute, which cannot be moved by him till the day after the day for shewing cause.

If the defendant makes the rule absolute, draw up same at the clerk of the rules; pay 5s.; then get a double 2s. 6d. stamp put upon the rule, bespeak the roll of Mr. Edge, so as the Master may mark the costs; pay in term time 1s. 6d.; in vacation 5s. 10d. more for the keys of the treasury; chief clerk's fee 4s. 6d.

In this court no notice of motion necessary.

C. B.

Ingross affidavit on a 1s. 6d. stamp paper, swear it before a judge, and then speak to Mr. Sherwood to have roll in court, pay him 3s. 4d.; give affidavit to a serjeant with a fee of 10s. 6d., and he will move for judgment as in the case of a nonsuit; in the evening draw up rule at the secondary's, pay 5s. 6d.; serve copy thereof on plaintiff's attorney or clerk, shew the original, and on the day for shewing cause have the affidavit of service ready; and add these words, "and at the same time shewed him the said original rule." Give affidavit to a serjeant with a guinea, to move to make the rule absolute, which if no cause shewn is of course; then draw up rule at secondary's, pay 6s. if of common length; take same with a double half crown stamp paper (make an incipitur of the declaration thereon) to the prothonotary's clerk, and he will sign judgment; pay 7s. 4d. then tax the costs and take out execution.

The affidavit as the ground for such judgment for not proceeding to trial in due time, issue having been joined the last term should state, that issue had been joined early enough in the last term for the plaintiff to have tried his cause in that term. *Woulfe v. Shells*, 1 C. B. 282.

But in the third term a general affidavit would be sufficient, stating issue was joined in the former term. *Ib.*

In this court notice of motion requisite.

(D)

(D) What Excuse is sufficient, and of the peremptory Undertaking.

In C. B. peremptory undertaking is of itself sufficient

In C. B. in all cases where an application is made for the first time for judgment as in the case of a nonsuit, it is sufficient in answer to such application to undertake peremptorily

remptorily to try without alledging any reason for not having before tried the cause; and whatever may have been the former practice, in future it is to be understood, that the first motion for such judgment is only a mode of obtaining a peremptory undertaking. 2 C. B. 119. *Mallet v. Hilton*.

So indeed in K. B. it is almost a matter of course for a peremptory undertaking to be accepted.

But if plaintiff has any real excuse for not proceeding, it will be admitted, and the rule for judgment as in case of a nonsuit discharged, as where his witnesses are absent, or prevented by illness from attending the trial. Bar. 316. *Jones v. Stephenson*. Or when he himself was ill. Bar. 313. *Clark v. Garrill*.

It is a good cause against a rule for judgment as in case of a nonsuit, that defendant has become insolvent since action brought; for it would be extremely hard if a party should be obliged to proceed and put himself to expence, without a possibility of recovering either debt or costs. *Baily v. Wilkinson*, Doug. 671. But Q. as a general rule.

So where the record was withdrawn in a penal action because the principal witness refused to give evidence lest he should subject himself to a penalty on the same act, it was held a good excuse; nor is there any difference between penal or other actions. *Raynes v. Spicer*, 7 D. & E. 178.

Plaintiff countermanded in due time, and told defendant's attorney that he could not go to trial, for want of a material witness: nevertheless, the next term, defendant moved for judgment as in case of a nonsuit; but on shewing cause, the above facts being disclosed, court discharged the rule with costs. *Anon.* Hil. 37 G. 3.

If the cause is put off on a peremptory undertaking, and plaintiff still does not proceed, let defendant get office-copy of rule, make affidavit of the fact, that plaintiff did not proceed to judgment according to his peremptory undertaking, and move the court for judgment thereon; it is absolute in first instance.

Although plaintiff has undertaken peremptorily to proceed to trial at next assizes, yet defendant is not bound to attend and be prepared with witnesses without having had fresh notice of trial.

Nor will the costs of such attendance and preparation be allowed, though he obtain judgment as in case of a nonsuit, on account of plaintiff's not proceeding to trial. *Ifield v. Weeks*, 1 C. B. 222.

Although notice has been given of a motion for judgment as in case of a nonsuit, for not proceeding to trial in due time after

in all cases upon the first application.

And in K. B. almost a matter of course.

What a good excuse for not proceeding.

Absence of witnesses.

Insolvency of defendant.

How if plaintiff does not proceed after peremptory undertaking.

Fresh notice of trial must after such undertaking be given.

So, fresh notice in C. B. of motion for judgment for not

proceeding after
such undertak-
ing.

after issue joined, on which plaintiff enters into a peremptory undertaking to try; yet notice must also be given of the like motion for not proceeding to trial in pursuance of the undertaking. *Gooch v. Pearson*, 1 C. B. 527.

There is no difference between the two motions. Statute requires notice in both. *Ib.*

When second
excuse admit-
ted.

After peremptory undertaking, a second excuse may be shewn; and it is in the court's discretion to admit it or not. *Milton v. Terrill*, Bar. 315.

A term's notice
not required in
moving for this
judgment.

In both courts, the rule of requiring a term's notice, when no proceedings have been had for a twelvemonth, does not extend to motions for judgment as in case of a nonsuit: the reason given is, that it is a rule of 13 G. 2. previous to the statute 14 G. 2. authorizing this kind of judgment. *Row v. Dunning*, Bar. 308. *Manley v. Wortley*, 2 Blac. 1223. *Doe v. Moses*, 5 D. & E. 634.

(E)

(E) In what Cases Judgment as in Case of a Non-suit is allowed.

This judgment
founded on stat.
24 Geo. 2. c. 17.

This proceeding is founded upon the statute 14 Geo. 2. c. 17. whereby it is enacted, that "where any issue is, or shall be joined in any action or suit at law, in any of his Majesty's Courts of Record at Westminster, the Court of Great Session for the Principality of Wales, the Court of Great Session for the County Palatine of Chester, the Court of Common Pleas for the County Palatine of Lancaster, or the Court of Pleas for the County Palatine of Durham; and the plaintiff or plaintiffs, in any such action or suit, hath or have neglected, or shall neglect to bring such issue on to be tried, according to the course and practice of the said Courts respectively, it shall and may be lawful for the judge or judges of the said Courts respectively, at any time after such neglect, upon motion made in open court (due notice having been given thereof), to give the like judgment for the defendant or defendants, in every such action or suit, as in cases of nonsuit; unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issue; and if the plaintiff or plaintiffs shall neglect to try such issue, within the time or times so allowed, then and in every such case, the said judge or judges shall proceed to give such judgment as aforesaid."

And by sec. 2. "All judgments given by virtue of this act shall be of the like force and effect as judgments upon
" nonsuit,

" nonsuit, and of no other force and effect." " Provided also that the defendant or defendants shall, upon such judgment, be awarded his, her, or their costs in any action or suit, where he, she, or they would, upon nonsuit, be entitled to the same, and in no other action or suits whatsoever."

Costs of such judgment.

First, this judgment is only where plaintiff hath neglected to bring the issue on to be tried, according to the practice of the courts.

Explanation of above statute.

When a plaintiff, therefore, has carried a record down for trial once, the court will not give judgment, as in case of a nonsuit, for not carrying it down a second time, even though it were made a *remanet* the first time; for the terms of the act are complied with by plaintiff's carrying record to trial once; and after that by the practice of the court, the defendant should carry down the record by proviso. *Newburn v. Langley*, 3 D. & E. 1.

1st, It does not extend to cases where record has been once carried down.

But this is upon the supposition, that either the action is brought on to trial, or at least every thing done to promote such trial; for if the record, when carried down, be withdrawn by plaintiff, without sufficient reason, judgment as in case of nonsuit may be had.

So that where plaintiff obtained a verdict, and afterwards a new trial was granted, defendant cannot have judgment as in case of a nonsuit, if plaintiff does not proceed a second time to trial. *Porzelius v. Maddocks*, C. B. 101.

Or when plaintiff was nonsuited, and afterwards nonsuit was set aside, and plaintiff neglected to go to trial again. *The King v. Pippett*, 1 D. & E. 492.

Because if plaintiff does not give fresh notice, and proceed to trial at the next sittings or assizes, defendant may afterwards carry record down by proviso.

In all cases, therefore, where both parties are actors, and where defendant, in the first instance, is entitled to try by proviso, defendant must still resort to trial by proviso, and cannot have judgment as in case of a nonsuit; for plaintiff is no more obliged to carry down the record than defendant, as in actions of replevin. *Jones v. Concannon*, 3 D. & E. 661. *Shertridge v. Herne*, 5 D. & E. 400.

Or where either party may in first instance carry it down.

And this in both courts.

Secondly, by the words of the statute, such judgment is only to be, where defendant would, upon nonsuit, be entitled to same. Whenever, therefore, plaintiff could not be nonsuited at trial judgment as in case of nonsuit cannot be, because the case of a nonsuit does not at all exist. *Weller v. Foyton*, Burr. 359.

2d, Not to cases where plaintiff could not be nonsuited at the trial.

Thus when there is judgment by default against one defendant in a joint action, the other cannot nonsuit the plaintiff.

plaintiff at the trial, on issue joined by him; nor if the plaintiff neglect to proceed to trial, can he obtain judgment as in case of a nonsuit. *Weller v. Gayton*, Burr. 358. See *Harris v. Butterley*, Cow. 483. *Hannay v. Smith*, 3 D. & E. 662.

So after payment of money into court, it is said that plaintiff cannot be nonsuited. But Q. And whether he cannot have judgment as in case of a nonsuit?

May be had on a mandamus.

Judgment as in case of a nonsuit may be given in a traverse of a return to a mandamus. *Ren v. Mayor of Stafford*, 4 D. & E. 689. Though by 14 G. 2. c. 17. it seems only to extend to actions and suits between parties.

Or qui tam action.

In B. R. a rule nisi in a qui tam action for like judgment as in case of a nonsuit, was made absolute, no cause being shewn. 1 Wil. 325. *Watson v. Jackson*.

A common informer may be nonsuited, and a qui tam action is within the statute. Bar. 315.

Not in writ of right.

This statute does not extend to a writ of right, so as to give costs to the tenant on a judgment as in case of a nonsuit. *Newman v. Goodman*, 2 Blac. Rep. 1093.

How such judgment to be obtained in a joint action.

In a joint action, all the defendants must join in the application for judgment as in case of a nonsuit, whether they all appear and plead, or do not all appear. *Watson v. Jackson*, Say. 22. *Jennings v. Wilson*, lb. 103.

Q. How far plaintiff on a nonsuit is out of court?

In the case of *King v. Pippett*, 3 D. & E. Buller J. said, The defendant's counsel is not quite correct in saying, that in case of a nonsuit the plaintiff is out of court. I remember a case many years ago, where, on a motion for judgment as in case of a nonsuit, Lord Mansfield said it was very extraordinary to suppose the plaintiff out of court when he is nonsuited; for if he is nonsuited, by mistake of the judge, at the trial, he could not afterwards move to set it aside, unless he were in court.

How if rule for such judgment be discharged on a false affidavit.

If a rule to shew cause why there should not be judgment as in case of a nonsuit, be discharged on an affidavit which contains an answer false in itself, the court will not afterwards open the matter on an affidavit which disproves the contents of the former one; but if they saw reason to doubt it at the time, they would suspend their judgment till the matter was inquired into. *Davis v. Cottle*, 3 D. & E. 405.

Of writ of error brought on such judgment.

The court have laid it down as a general rule, that though a writ of error may be brought on a judgment of nonsuit; yet the court will not in any case stay proceedings, or set aside an execution for the costs on that account. *Box v. Bennett*, 1 H. Bl. 432.

Whether a stay of proceedings.

So also is the case of *Kempland v. Macauley*, 5 D. & E. 436.; for it is manifest it is only broh or delay.

There

There is no occasion for any confession of that fact, for there can be no error of which plaintiff can avail himself; for if the record were manifestly erroneous, the plaintiff, who has made default by suffering a nonsuit, can never have a judgment afterwards in his favour.

But in B. R. afterwards, in *Lewett v. Perry*, 5 D. & E. 669. it seems otherwise; there, proceedings on such a judgment were stayed; and though *Box* and *Bennett*, and *Kempland* and *Macauley*, were cited, *per Cur.* The practice not to stay proceedings pending a writ of error, must be confined to those cases where the party himself, his attorney or bail, declare it is brought for delay.

After rule nisi for judgment as in case of a nonsuit court will not grant rule for plaintiff to amend his declaration. *Eagles v. Osbaldestone*, Bar. 318. Nor to discontinue. *Low v. Peacock*, Ib. 316.

Q. Whether after rule nisi for judgment plaintiff can amend declaration?

Though, in another case when issue was joined, and notice of trial given, but a mistake in the declaration being discovered, plaintiff did not proceed. Defendant applied for judgment as in case of a nonsuit. The court, on shewing cause, gave leave, as the issue-roll was not stuck into the bundle, and the amendment small, to amend on paying of costs, and for not proceeding to trial. Bar. 317. *Beere v. Bowling*.

Executors are not liable to costs on a judgment as in case of a nonsuit, under statute 14 G. 2. c. 17. *Booth* and others, executors, v. *Holt*, 2 C. B. 277.

Of costs on such judgment.

(F) How Defendant can have Judgment as in Case of Nonsuit, and Costs for not proceeding to Trial.

(F)

Formerly, if defendant applied for, and had costs for plaintiff's not proceeding to trial, and afterwards moved for judgment as in case of a nonsuit, the motion was denied; it being held, that as he had made his election of one remedy, he could not have the other. Bar. 316. *Ogle v. Moffit*. *Newman v. Goodman*, 2 Blac. 1110.

But it now seems settled in both courts, that a party having moved for judgment as in case of a nonsuit, has not thereby waived the costs of not proceeding to trial; and in the Common Pleas, it is not necessary to apply for them by a separate motion; but they may be given on the motion for judgment as in case of a nonsuit; or the court may make the payment of such costs the terms of discharging the rule for judgment as in case of a nonsuit, where good

reason is shewn for not proceeding to trial. *Jolliffe v. Morris*. 1 Puller and Bosanquet, 38. *Jordaine v. Sharpe*, 2 H. Bl. 280.

But in K. B. costs for not proceeding to trial, and judgment as in case of nonsuit, must be the subjects of different motions. 1 Puller and Bosanquet, 38. and *Earl of Leicester v. Wooden*, Mich. 21 G. 2. K. B.

SECTION V.

Of Judgment by Confession.

Its meaning.

It often happens that the defendant, conscious of having no good ground of defence, confesses the action; which not only saves him the additional expence of the further proceedings by writ of inquiry, or the like, which would ultimately fall upon him; but is also frequently an inducement to plaintiff to indulge him with time for payment of the debt, until which time all proceedings are stayed; the defendant agreeing to certain terms on his part, such as not to bring a writ of error, or file a bill in equity.

The form of such confession may be as follows:

The form thereof in case.

"I confess this action, and that the plaintiff hath sustained damages to the amount of 50l. besides his costs and charges to be taxed by the master (if in B. R., or by prothonotary in C. B.) and no judgment shall be entered up, or execution issued until the day of next, in default of payment of the sum of 25l. being the debt in this action, together with the said costs; and that no writ of error shall be brought, nor any bill in equity filed; and that in case the plaintiff shall enter up his judgment in default of payment, he shall be at liberty to levy the said 25l. together with the costs taxed, and also sheriff's poundage, and all other incidental charges. As witness, &c."

In debt.

If it be an action of debt, then—"I confess the debt in this cause, and that the plaintiff hath sustained damages to the amount of 1s. besides his costs and charges to be taxed, (as above,) and the debt is agreed to be paid as follows, (stating the days of payment,) and then as above."

Where to be written.

This confession may be written in the margin of the declaration, or on back of inquiry, or on plain paper.

A cognovit actionem relicta verificatione, what.

This confession may be before the plea pleaded; it is then merely a confession of the action, or *cognovit actionem*, as it is called; but if made after plea pleaded, it is then a confession of the action, with an agreement to withdraw the plea, and is termed a *cognovit actionem relicta verificatione*; it then states, *I hereby consent to withdraw the plea pleaded in this*

Form thereof.

this cause, and confess the action, and that the plaintiff hath sustained, &c. (as before).

If after demurrer, thus:—I hereby consent to withdraw the demurrer, and that the plaintiff take judgment for the debt of declared on, besides his damages and costs, &c.

If judgment is to be entered up, sign it on double half crown stamp, as it is final, making *incipitur* on judgment-paper; no occasion for new roll; file warrant of attorney, if not before done; tax costs, and sue out execution.

How to proceed on a cognovit.

If confession be after plea, a *retraxit* must be entered; which is done in C. B. by taking judgment-paper to prothonotary, who will sign judgment, and mark *retraxit* thereon; but in K. B. defendant's attorney should come in person before the master, to withdraw plea. Tidd, 397. Imp. C. B. 465. Ld. Ray. 345.

How if retraxit necessary.

OBSERVATIONS.

When a *cognovit* is given upon terms, plaintiff should take care that it is expressed as part of the terms, that defendant shall bring no writ of error, or file any bill in equity; for this is not implied, but must be particularly mentioned. *Wade v. Rogers*, Blac. 780.

Caution necessary in taking cognovit.

If no terms be expressed, final judgment may be immediately signed, and execution sued out.

A *cognovit actionem*, though after plea pleaded, is, strictly speaking, only an acknowledgment of the count; but the party may confess more, if he pleases.

The extent and operation of a cognovit.

Thus in an action of debt against an executor, he pleaded *plene administravit*; plaintiff replied assets; defendant, *relictâ verificatione cognovit actionem*. Judgment was entered for plaintiff, *de bonis testatoris*. It was moved, that confession should also contain *he had goods sufficient*, and that it might be added to the entry; but court refused, saying, the confession naturally can extend no further than to the count, which is of the debt, not of the assets; yet if defendant will confess more, he may; there are entries both ways. *Bird v. Culmer*, Hob. 178.

So it may be only for *part* of the cause of action; in which case plaintiff can only sign judgment for the part confessed, and must proceed as to residue.

How if only for part.

It is clear, that where a judgment by confession is given upon terms, if plaintiff proceed contrary to the terms expressed, the court will, on motion, interpose, because such judgment is, in effect, rendered only a conditional judgment; but it used to be held, that if the *cognovit* were general,

In what cases court will interfere therein on motion.

neral, and a subsequent and independent agreement was entered into between the parties, restraining its operation; although plaintiff proceeded contrary to such agreement, the court would not interfere upon motion; but put the defendant to his action upon the agreement. *Anon.* Sal. 400. Tidd, 308.

But in the case of *Hatton v. Young*, in C. B. Blac. 943. the court did take notice of such subsequent agreement, and set aside the judgment, as being contrary to good faith and the plaintiff's express undertaking.

How far it
affects bail.

A *cognovit* by the principal, without notice to the bail, does not discharge the bail. *Hodgson v. Nugent*, 5 D. & E. 277.

What proper
when taken
from prisoner.

If a *cognovit* be taken from a prisoner, it is proper for an attorney on the part of the defendant to be present; for though, in strictness, it is not within the rule of 15 Car. 2. (see next Section), which only relates to defendants in custody of any sheriff or his officer, yet the court will interfere in such case on behalf of a prisoner. *Parkinson v. Caines*, 3 D. & E. 616.

When judgment is signed on a *cognovit*, a bill should first be regularly filed, provided none was filed before the *cognovit* given; but where judgment was signed, without first filing a bill, as it was done at the defendant's request to save expence, court gave leave to file the bill *nunc pro tunc*. *Walker v. Woolley*, 37 G. 3. Notes, 7 D. & E. 207.

So common bail should first be filed according to the statute, if defendant has not appeared himself in court; but yet where it was not filed until after the judgment signed, and after the next term from the return of the writ, which was irregular, defendant was held estopped from objecting to it by his *cognovit*; it being, in fact, filed before he made the objections. *Davis v. Hughes*, 7 D. & E. 206.

SECTION VI.

Of Judgment on Warrant of Attorney.

Another common way of settling a debt is by giving a bond conditioned to pay the amount thereof at a given time, together with a warrant of attorney, authorizing the person named therein to confess judgment for the defendant, on failure of performance of such condition.

Thus a security is given to the creditor, whilst the debtor avoids the expence of litigation, and is accommodated with time for payment of the debt.

The

The bond and warrant may be given at any time, either before or after action brought. As it is in constant practice to give these warrants, and to enter up judgments thereon, it will be proper to consider,

(A) The Validity of a Warrant of Attorney.

(B) Its Operation and Effect.

(C) The Time and Manner of entering up Judgment thereon.

(A) The Validity of a Warrant of Attorney.

The validity of a warrant of attorney depends upon the competency of the parties giving and receiving it, their situation at the time, and the consideration for which it is given.

The validity of the warrant.

It must be given by a person competent in law to do such an act.

Thus a warrant of attorney given by an infant is absolutely void; though there may be circumstances of fraud on the part of the infant. *Saunderson v. Thorn*, 1 H. Blac. 75.

How if given by an infant.

Or by a feme covert, except she lived and acted as a feme sole; in which case, court refused to set the warrant aside upon motion, and put her to her writ of error. *Anon.* Salk. 400.

By a feme covert.

If an infant join with another in giving such warrant, it is void only as to the infant. *Motteux v. Sir John St. Aubyn*, 2 Blac. 1133.

If by an infant and another person;

So if a warrant of attorney be given to confess judgment to a feme covert, and it be confessed accordingly, it is void. *Roberts v. Pierfon*, 2 Wil. 3.

or to a feme covert.

The situation of the person giving it should be considered; for if the party be in custody at the time, the following rules and cases must be attended to:

The situation of the person giving it.

K. B.

C. B.

No warrant of attorney for confessing a judgment executed by any person in custody of any sheriff or other officer shall be of any force, unless some attorney for and on behalf of such person in custody, and expressly named by him, be present to inform him of the nature of such warrant, which attorney shall subscribe his name as a witness to the

No bailiff or sheriff's officer shall presume to exact or take from any person, being in his custody, any warrant to acknowledge a judgment but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto, which said warrant shall be produced when the said judgment shall be acknowledged;

If in custody, an attorney must be present.

B b 4

and

due execution thereof. *R. East.*
15 *Car. 2.*

The court, by degrees, relaxed in their observance of this rule, and even held that if plaintiff's attorney was present it was sufficient. *Andrews v. Richards*, 1 *Barn.* 242.

Whereupon the following rule was made:

That no warrant of attorney executed by any person in custody of any sheriff or other officer, for the confessing of judgment, shall be valid or of any force, unless there be present some attorney on the behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant of attorney before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof. 2 *R. B.* 4 *Geo. 2.*

and no attorney shall enter or acknowledge, or cause to be entered or acknowledged, any judgment by colour of any warrant gotten from any defendant being under arrest, otherwise than as aforesaid. *R.* 15 *Geo. 2.*

Every warrant of attorney for confessing a judgment in this court shall be read over by the person who is to execute the same, or by some other person to him, before the execution thereof; and if judgment shall be entered up upon any such warrant of attorney which shall not be so read over as aforesaid, such judgment, upon motion, may be set aside as irregular. *R.* 15 *Geo. 2.*

N. B. This last rule is now declared not to be in force. *Bul-ler J.* said it was absurd, nor did prothonotary know of its ever having been acted upon. *Taylor v. Parkinson*, 2 *H. Blac.* 383.

Explanation of
the above rules
of court.

The above rules being intended for the protection of prisoners, and to prevent impositions upon them, have received a liberal construction; and the courts entertain the same jurisdiction of the matter before as after the judgment entered upon any warrant of attorney so obtained, and will order such warrant of attorney, and all collateral securities, to be delivered up and cancelled. *Duncan v. Thomas*, *Doug.* 196.

Extend only to
those in custody
on mesne pro-
cess;

These rules only extend to persons in custody upon mesne process, and not to those in custody upon an execution. The reason is, because, in the former case, the debt is not liquidated, and therefore, under duress, he may be prevailed upon to confess more than is really due; but in the latter, it is liquidated. *Fell v. Riley*, *Cow.* 281. *Watkins v. Hanbury*, *Str.* 1245. *Crompton v. Steward*, 7 *D. & E.* 19.

and civil pro-
cess;

Nor to persons in custody under criminal process. *Charlton v. Fletcher*, 4 *D. & E.* 433.

and to warrants
given to plaintiff
himself;

Nor to warrants of attorney given to a third person, not the party, at whose suit he is in custody. *Finn v. Hutchinson*, *Ld. Ray.* 797. *Gillman v. Hill*, *Cow.* 142. *Churchy v. Roffe*, 5 *Mod.* 144.

and in the same
cause.

Nor to warrants to confess judgment in any other action, except in the particular cause whereupon he is in custody. *Holcombe v. Wade*, *Burr.* 1793.

But

But these rules are not without exception; for if it could be shewn that a party, even in execution, had been prevailed upon to acknowledge a judgment for more money than was really due, the court would give relief, because cases of fraud and imposition are exceptions to all rules whatever. *Fell v. Riley*, Cow. 281.

Some exceptions to the rules in case of persons in custody in execution.

And in general it is the safest way, and has the fairest appearance, to have defendant's attorney present when a warrant of attorney is taken from a prisoner, though in execution. *Parkinson v. Caines*, 3 D. & E. 618.

A defendant lodging within the rules of the Fleet, at the house of the plaintiff, who was the officer that had arrested him, and who afterwards became security to the warden, was deemed a prisoner within the meaning of the above rules of court, because the plaintiff could at any time deliver him into custody. *Warbaker v. Gascoigne*, Blac. 1297.

What is deemed being in custody

As to the attorney required by the rules, it must be a regular admitted attorney, not a clerk. Bar. 42. *Barnes v. Ward*.

What attorney must be present.

And he must attend as attorney for the defendant. *Ruffle v. Hitchcock*, Blac. 1097. And this, at defendant's desire, as being named by him for the purpose, agreeable to the above rule, 4 G. 2.; for the presence of the plaintiff's attorney is not sufficient, though the defendant consent to his acting as his attorney; also *Hutson v. Hutson*, 7 D. & E. 7.; but this seems a little relaxed in what fell from the court in *Crompton v. Steward*, 7 D. & E. 20. nor need it be an attorney of the same court in which the judgment is to be entered up. *Bland v. Pakenham*, Str. 530. *Vilmot v. Barry*, Bar. 44.

But if defendant himself be an attorney, no other need attend. *Walton v. Stanton*, Bar. 37.

The above rule of court must be adhered to, though the warrant of attorney to confess judgment here be given in Ireland. Str. 1247. *Fitzgerald v. Plunkett*.

Rule extends to warrants given in Ireland.

But even as to this part of the rule there may be exceptions; for the courts will not suffer their rules to be made instruments of fraud.

Exceptions as to this part of rule.

If, therefore, such warrant be executed by defendant, (no attorney being present,) purposely with a view to cheat plaintiff, court will not relieve. *Gilman v. Hill*, Cow. 141.

In cases of fraud.

The next thing to be considered is, the consideration of such warrant of attorney.

The consideration of the warrant.

If given upon an usurious contract or consideration, court will, on motion, direct an issue to try the usury, and enlarge the rule to set aside the judgment in the mean time; and if the fact be so found, warrant of attorney will be vacated.

Usurious consideration bad.

Cook v. Jones, Cow. 727. *Machin v. Delaval*, Bar. 52.

The

Or if obtained
by fraud.

The warrant need not be read over to the party executing it in either court, *Taylor v. Parkinson*, 2 H. Bl. 383. But if such warrant be obtained by fraud, court will order it to be delivered up, even before judgment entered thereon. *Duncan v. Thomas*, Doug. 196.

How such facts
shall be tried.

If the validity of the warrant of attorney be contested on the ground of forgery or the like, court will order an issue to try whether it were duly executed or not. Bar. 239. *Gibson v. Bishop of Bath and Wells*.

(B)

(B) Of the Operation and Extent of the Warrant of Attorney, and of the Revocation and Countermand thereof.

Judgment must
be agreeable to
the power.

A judgment entered under a power of attorney, must be warranted by that power, and consequently a general power only warrants a general judgment and execution, not a special one. *Buxton v. Barden*, 1 D. & E. 80.

Case of debtor
being discharged
under insolvent
act.

Thus, where a defendant gave a warrant of attorney, and before judgment entered thereon, was discharged under the insolvent act, whereby his person cannot be taken in execution, but the execution is special against certain goods only, plaintiff cannot afterwards enter up judgment and sue out such special execution. *Ib.*

His only way seems to be, to move the court to plead the act for the defendant, and thus the special exemption is put upon the record, and the special execution may follow. *Ib.*

Case of bank-
ruptcy.

A bond and warrant of attorney to confess judgment given by a bankrupt after his bankruptcy, (who was in execution for a debt due before,) is not barred by his certificate. *Birch v. Sharland*, 1 D. & E. 715.

If warrant spe-
cifies particular
term to enter
judgment.

If the warrant be to confess judgment of a certain term, judgment can be entered only of that term. 1 Mod. 1. But if general, it may be entered within the time mentioned, *post C.*

If an executor
gives a warrant.

If an executor confesses judgment, or suffers judgment by default, he admits assets, and is estopped to say the contrary in an action on such judgment, suggesting a *devastavit*. *Skelton v. Hawling*, 1 Wil. 258.

A warrant of one executor is not sufficient to enter up judgment against the other, because it would be estopping the other from saying he is not executor; and being without his knowledge, it might subject him to a *devastavit* for the paying of other debts. Str. 20.

Such security is
a cesset executio
for a time.

If a bond and warrant of attorney be given, and condition of bond is not to pay the money till a certain day, it shall operate

operate as a *cesset executio* until that time; and if judgment be entered up, and execution issue before, court will set execution aside, but suffer the judgment to stand. *Anon. Cas. temp. Hard. 270.*

So, though a general warrant be given, if afterwards, on a distinct paper not under seal, plaintiff engages not to enter up judgment, or take out execution till a certain day, if he breaks his agreement, court will interfere on motion. *Haston v. Young, Blac. 943.*

How court will interfere if not abided by.

A man, after he has given a warrant to enter a judgment, cannot revoke it by the course of the court; and though he endeavour to revoke it, yet the court of K. B. will give leave to plaintiff to enter the judgment. *Ld. Ray. 850.*

Of the revocation of the warrant.

But the death of the defendant who gave the warrant is of itself a countermand, 1 Vent. 310.; although this is under certain restrictions; for if he dies before a year and a day has elapsed from the time of signing the warrant, the judgment may still be entered either of the term in which he died, or of the preceding term if he died in vacation. *Chaney v. Needham, Str. 1081. Savill v. Willshire, Bar. 270. Oades v. Woodward, Salk. 87.*

By death of defendant.

And though he be dead since, yet if court have granted leave to enter up judgment, they will not afterwards recall it. *Ib.*

So, the death of the plaintiff, for whose benefit and at whose suit the judgment was to be confessed, puts an end to the power, and judgment cannot afterwards be entered, unless the warrant mentions to enter judgment at the suit of him, his heirs, executors, or administrators, in which case executors, by leave of court, may enter judgment. *Wild v. Sands, Str. 718. Coles v. Haden, Bar. 44.*

So, if a warrant of attorney be given by a feme sole, and she afterwards marry before judgment entered, it is a countermand, and judgment shall not be entered against the husband and wife, for that would charge the husband, *Anon. Salk. 117.*; though it seems as reasonable that he should be charged in this case as for a bond or other debt, which he is liable for during the coverture, though not after. *Ib.*

By marriage of the person giving the power.

And in *Show. 89.* it is said, that a bill may be filed and judgment entered against both.

But if the warrant be given to a feme sole, marriage is no countermand, because it is for the husband's advantage, *Salk. 117.*; and judgment may be entered up in the name of the husband and wife, 7 Mod. 53. *Marder v. Lee, Burr. 1469.*; in which latter case judgment was held irregular for want of an application to the court for leave to enter it up, founded upon a proper affidavit of the marriage.

Of the person to whom it is given.

What application to the court necessary.

(C) Of

(C) (C) Of entering up the Judgment on Warrant of Attorney.

The warrant operates according as it is special or general, as observed *ante* (B), but if it be in the usual form to enter up judgment of such a term, or any subsequent term, it then falls within the rules hereafter mentioned.

When judgment may be entered without leave, when with leave of the court.

Judgment on such warrant of attorney must be entered within the year and day, after which it cannot be done without the leave of the court, 6 Mod. 212. *Lusington v. Waller*, 1 H. Blac. 94.; for the plaintiff cannot of his own accord enter it as of a term when the party was alive.

Of moving the court, and of the affidavit when the party was living.

Nor will the court grant such leave without an affidavit that the debt is unpaid, and the defendant is living; but if it states that he was alive within the term in which the application is made, it is sufficient, but not at a more distant period.

Where the plaintiff was a lunatic, court held affidavit good as to debt being unpaid, sworn by the person who for the last three years had received the interest on the bond, *Coppendall v. Sunderland*, Bar. 42.

The reason seems to be this; death, generally speaking, is a revocation of the power; judgment ought therefore to be entered up during the life of the defendant.

Why such application to the court necessary.

This judgment may be entered up without leave any time within the year; if, therefore, the party dies within the year, judgment will appear to be entered in his lifetime; for if he dies in term, it will relate to the first day of term, and if in vacation, it may be entered as of the preceding term; but after the expiration of the year, judgment must be entered as of that term in which he has leave: it is necessary, therefore, that it should appear to the court granting such leave, that the defendant be alive; but if alive within the term it is sufficient, because judgment entered of that term will bear relation to the first day of the term, and though in fact entered after the party's death it will be consistent. *Fuller v. Josslyn*, 1 Bar. 357.

Of the relation of the judgment to the first day of the term.

Purchasers not hurt thereby since the statute of frauds.

Nor can any detriment accrue to purchasers from this practice, since by the statute of frauds judgments with respect to them refer not to the first day of the term, but to the time of the actual signing, which is marked on the roll. *Gady v. Woodward*, 7 Mod. 93.

But although a judgment on a warrant of attorney entered in a vacation against a defendant who died in the preceding term is good because the judgment will relate back to the first day of such term, yet execution cannot be sued out upon it,

it, until it be revived against his representatives by *scire facias*.
6 D. & E. 368. *Heapy v. Parris*.

And the relation of the judgment to the first day of term is so material, that if on that day the party who entered up judgment appears not to have had authority so to do, though in fact at the time he signed and entered up judgment he had authority, it will be bad. *Gainsborough, executor, v. Foll-yard, Str.* 1128.

So the authority relates to the first day of term.

It frequently happens that bonds and warrants of attorney, given in vacation, become payable, and are entered up before the following term; in which cases, as the judgment will have relation back to a day anterior to the date of the bond whereon the plaintiff must declare in his entry, if he state it to have been made upon the day it bears date, the judgment will be erroneous; in such case, therefore, the entry ought to state the bond to have been made some day precedent to the first day of the term whereof the judgment is entered. 7 Mod. 38. Notes to Rules and Orders, 102.

Where testator died on same day judgment was signed, but before it was signed, held good, on authority of *Shelly's case* and *Woodward's case*, 7 Mod. 203. *Fuller v. Johnson*, Cal. tem. Hard. 158.

How if testator died same day judgment signed.

When judgment has not been entered within a year and a day, on a warrant of attorney given with a *post obit* bond, and the obligee does not apply for leave to enter it, till after the death of the person on whose death it is payable, court will not grant leave without a rule to shew cause. *Lusington v. Waller*, 1 H. Blac. 94.

Of warrant on post obit bond.

On a warrant of attorney to confess judgment to two, it may be entered on motion for the survivor. 2 Blac. 1301. *Futcher v. Smith*. *Todd v. Dodd*, 1 Wil. 312. *Still v. Still*, Bar. 40. cont. *Laycock v. Garforth*, Bar. 45.

Of warrant given to two, and judgment by survivor.

The courts are very cautious in granting leave to enter judgments *nunc pro tunc*, and refused it where the warrant was above 20 years old, upon the ground of presumption that the debt was satisfied. *Flower v. Ld. Bolingbroke, Str.* 639.

The defendant's name in a judgment on a warrant of attorney not amendable, though both the warrant of attorney and the bill upon the file were otherwise. *Sale v. Crompton*, 1 Wil. 61.

Judgment on warrants not amendable.

How to enter up the Judgment.

Judgment on a warrant of attorney is final. It is signed, therefore, on a double half-crown stamp. Common bail must be first filed, and a memorandum of warrant to enter such judgment, as directed by stat. 25 Geo. 3. c. 80. sec. 19, which

which may be had at the stationers; the warrants of attorney, and memorandum of the term judgment is signed, must be entered on roll in the usual way.

But it is first necessary to prepare an affidavit by the plaintiff and the subscribing witness to the warrant of attorney, that it was given for a just debt, that the debt is still unpaid, and that subscribing witness saw defendant duly sign and execute the warrant.

Nor will the affidavit of the subscribing witness be dispensed with by the court, unless under very special circumstances indeed.

If judgment to be entered up in term, it is a motion of course signed by counsel; if in vacation, judge, on affidavit being brought to him, will make an order.

This is upon the supposition that the judgment be entered within a year and a day; if not, leave of the court must be first obtained as before-mentioned, and if the judgment be of above 20 years standing, it is only a rule to shew cause.

SECTION VII.

Of Trial by Record.

Another peculiar mode of proceeding, of which we were to treat in this Chapter, is where some matter of record, as a fine, judgment, act of parliament, or the like, is pleaded by the one side, the existence of which is denied by the other: issue is then joined upon the plea or replication, as it may happen, of *nil tiel record*, which is tried not by any witnesses or jury, but merely by the record itself.

Various matters
of record plead-
able.

Various are the matters of record that are pleadable and to be thus tried by the record; as titles of nobility, whether earl or no earl, baron or no baron, shall be tried by the king's writ or patent only, which is matter of record. 6 Rep. 53. So in the case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours, for every league or treaty is of record. 9 Rep. 31. Also whether a manor be held in ancient demesne or not, shall be tried by the record of Doomsday in the king's Exchequer. Thus also upon the plea of a former judgment recovered by the plaintiff against the defendant for the same cause of action, or of another action depending for the same cause, or of outlawry, or of *comperuit ad diem* to a bail-bond, or of any act of parliament, or, in short, of any other matter of record, the general replication is *nil tiel record*, upon which the parties join issue, and the truth

or falsehood of such issue is determined by the party producing or failing to produce the record in question on a day given him for that purpose.

If a private act of parliament be misrecited, the adverse party cannot demur, but must plead *nul tiel record*. 3 Salk. 296.

The record to be produced may be a record of the same court, or of a different court to that in which the trial is to be had.

If it be of the same court, the replication of *nul tiel record* should conclude with giving a day for defendant to bring it in, because the issue is always in such case complete without a rejoinder; but if it be of another court, the replication may either conclude in the same way, and so render the issue complete, or with an averment, and prayer of debt or damages, which will compel the defendant to rejoin, "that there is such a record," for where the record is of another court, the replication is good either way. *Sandford v. Rogers*, 2 Wil. 13. *Newberry v. Strudwick*, Bar. 335.

If the proceedings be by original, a general return day should be given to bring in the record. If by bill, a day certain.

The plea of *nul tiel record* need not be signed. *Herbert v. Ld. Weymouth*, Blac. 816.

Where the proceeding is by original, and a general return day is given to bring in the record, the defendant ought to be called to bring in the record at the rising of the court that day, and if he fail, the rule for judgment should be "unless cause on the appearance day of that general return," and the record may be brought in on that or any intervening day; but where the proceeding is by bill, and the day given to bring in the record is a day certain, the record cannot be brought in after that day; but on that day, at the rising of the court, defendant ought to be called to bring in the record; and if he fail, the court will appoint the day to be inserted in the rule for judgment *nisi causa*. *Hopkins v. Knapp*, Bar. 264. *Calveras v. Pinkero*, Bar. 84. 343.

If the judgment upon the issue of *nul tiel record* be final, the rule, on failure of producing the record, should be for judgment, *unless cause within four days*, that defendant may have the usual time to move in arrest of judgment; but where the judgment is interlocutory, it may be a shorter time, because the reason fails, as defendant may move in arrest of judgment after execution of inquiry, the rule for judgment, in such case, not being given till the return of inquiry. *Hopkins v. Knapp*, Bar. 264.

But

To a misrecital of an act, nul tiel record proper.

The record may be of the same or different court.

Form of replication in both cases.

What day should be given.

Plea need not be signed.

How defendant called to produce the record, and the consequence of failing therein.

How, if judgment be final or interlocutory.

If record of same court, it must be produced on day or demand.

But in case the judgment or record pleaded be of the same court, there is a much more summary way of proceeding; for upon demand made, the party so pleading the same, must give the attorney for the adverse party a note in writing of the term and number-roll whereon such judgment or matter of record is entered and filed; and in default thereof, such plea is not to be received. Imp. C. B. 345. Carth. 453. Tidd. K. B. 481.

Judgment when peremptory or not:

And this whether the plea be in abatement or bar. Ib. If the matter of record pleaded be only pleaded in abatement, the judgment, on failure of producing the record, is not peremptory, but *respondeas ouster*. Ld. Ray. 550.

When final or interlocutory.

But if it be pleaded in bar, it is then judgment absolutely, Cro. Car. 566.; and it is either final or interlocutory, according to the nature of the action.

Nul tiel record bad, if profert made thereof in pleading.

Where a record itself is shewn to the court in pleading, the defendant cannot say *nul tiel record*; for by the *profert in curia*, it appears to the court that there is such a record. Co. Lit. 260. Hard. 158.

So if matter of record be mixed with matter of fact.

If the matter of record be mixed with matter of fact, and the matter of fact is put in issue as well as the matter of record, the issue should conclude to the country, and the trial be by a jury; if only the matter of record be in issue, the conclusion should be to the record. *Esplin v. Smallett*, Say. 208. *Whitmore v. Rooke*, Ib. 299.

If record produced, how it operates as an estoppel.

If upon an issue of *nul tiel record* of a judgment the record is produced, the party, and all that claim under him, are estopped to say there is no such judgment; for it is entered upon the roll, *quod habetur tale recordum*; and the party cannot say that this was not the judgment against him, but that it was another judgment. Ld. Ray. 1050. *Treviban v. Lawrence*.

If the record be of another court, it must be produced by certiorari and mittimus.

When the record pleaded is a record of another court, the only way of producing it is by suing out a *certiorari* from the court of chancery, for such court where the record is, to certify the record; and upon the return of *certiorari*, but not till then, the record will be sent by *mittimus* to the court where it is to be produced.

Thus, if in the Common Pleas, a record of the King's Bench be pleaded, although, in general, it is said the records of the King's Bench shall not be moved into any other court, by this means they may be removed. Cro. Car. 297. *Luttrell v. Lea*, 2 Saund. 344.

It may be supposed, that although this formal way of proceeding might be necessary, where an inferior court requires a record to be produced from a superior court; yet that

that a more summary way might be adopted by a superior court, who has jurisdiction over an inferior, to get a record required from the latter.

But where an attempt of that kind was made by motion in the King's Bench, for an order upon the proper officer of the court of Common Pleas to attend there with the record of that court, that it might be inspected, upon the ground of saving time and expence, and of the general jurisdiction of the King's Bench over inferior courts; Lord Mansfield and the other judges refused; saying it would be wrong to go out of the established rules and methods of proceeding. *Hewson v. Brown*, Bur. 1034.

Court of K. B. will not interfere in a summary way.

If the record be in a county palatine, there shall be a writ to the chamberlain to certify. Clift. 148. If in an inferior court, to the proper officer; and if he refuses, there shall be a rule to do it upon pain; and then if he does not certify, an attachment shall go. Palm. 562.

So if record be of co. pal.; or of inferior court; attachment if officers refuse to certify.

In these cases, if the inferior court certify the tenor of the record, it is sufficient. 3 Salk. 296.

To certify tenor of record sufficient.

How to proceed when the other side is to produce Record.

K. B.

When the parties join in issue upon nul tiel record, the paper-book having been made up by clerk of papers and returned by the other side, get the master to mark on paper-book, "a rule to produce the record;" it is a four-day rule, and is to be entered with clerk of rules; serve copy on the attorney of the other side; get a roll; enter all the proceedings regularly thereon; docket it, and carry it to Treasury Chamber to be filed; attend at Westminster on the day given by the rule for record to be produced; bespeak the roll at the Treasury to be brought into court; give paper-book to one of the criers, who will call defendant to produce the record, or he will be condemned. If he does not produce it, secondary will mark on roll that he hath not produced the record; this is signing the judgment.

If the judgment be interlocutory, give notice of inquiry, and proceed to execution.

Vol. I.

If

C. B.

In this court the issue of nul tiel record, as all others, is made up by the attorney himself.

Enter the whole issue on the roll, and file warrants of attorney; take roll to prothonotary and docket it; leave it with clerk of dockets, who will carry it to Westminster on the day mentioned in plea for record to be produced; party will be called by him to produce same; if he fails, draw up at night rule with secretary.

If the judgment be final, such rule is a four-day rule, at the expiration of which secondary certifies on the rule that no cause has been shown; which certificate must be produced to the prothonotary when judgment is signed, which is to be on a double half-crown; tax costs and sue out execution; but if the judgment be interlocutory, enter incipitur of declaration, &c. on treble penny; carry it to prothonotary, who will sign interlocutory judgment; then proceed to execute

Cc

inquiry,

If final, a four-day rule for judgment must be given; sign judgment on a double half-crown stamp paper; get costs taxed, and proceed to execution.

inquiry, provided notice has been already given; if not, give notice, though notice of inquiry may be given on delivery of issue, thus: "in case judgment be given for plaintiff, a writ of inquiry will be executed on such a day."

Long v. Lingwood, P. R. 443.

Upon completing the issue you may give the day yourself for producing the record in the replication, provided it be four days after delivery of issue.

If the action be by original, it should be on a general return; if by bill, on a day certain. Imp. C. B. 342.

How when the Record is to be produced by yourself.

*If, having declared upon a judgment, you intend to produce it on the issue of *nul tiel record*, get the roll of such judgment ready filed in the treasury; and having entered all proceedings, and docketed your roll as above, get one of the criers to bring the record of such judgment into court; which being read and compared with the issue by secondary, you may, in the evening, get a four-day rule for judgment, and proceed as above; so if it be a record produced by defendant, judgment will be entered that he has *perfected* the record.*

CHAPTER IX.

Of the Proceedings from Issue to Trial.

SEC. I. *Of the Issue and Paper-Book, and of entering the Issue.*

SEC. II. *Of Notice of Trial and countermanding same, and of Costs for not proceeding to Trial.*

SEC. III. *Of carrying down Record by Proviso.*

SEC. IV. *Of putting off the Trial.*

SEC. V. *Of making up the Record, suing out Jury Process, entering Cause for Trial, and of Remanents.*

SEC. VI. *Of Special Juries.*

SEC. VII. *Of granting a View.*

SEC. VIII. *Of examining Witnesses on Interrogatories.*

SEC. IX. *Of the Process to compel Witnesses to appear at the Trial.*

SECTION I.

Of the Issue and Paper-Book.

(A) *Of the Time, Manner, and Form of making up Issue and Paper-Books.*

(B) *Of striking out the Pleadings, and demurring or pleading general Issue.*

(C) *Of delivering and returning Issue and Paper-Book.*

(D) *Of Variance between the Issue and Pleadings, and amending the same.*

(E) *Of Continuances on the Issue-Roll.*

(F) *Of entering the Issue.*

(A) (A) Of the Time, Manner, and Form of making up Issue and Paper-Books.

WHENEVER the pleadings are come to that point, that neither side can allege any new matter, there being a direct affirmation of any fact or facts by the one party, and a denial thereof by the other, they are then said to be at issue; and the next step to be taken is to make up the issue, or, as it is sometimes called, the paper-book, (which is nothing more than a copy of all the pleadings that had before passed between the parties,) to enter it and proceed to trial.

But this cannot be done until the pleadings are at the stage above-mentioned; but the defendant must be called upon by rules of court to rejoin, or the like, until the parties are at issue.

But where the plaintiff's replication concludes to the country, and it is manifest that defendant can only join issue, plaintiff need not deliver it for that purpose, but may himself add the *similiter*, as it is called, and make up the issue, without any rule to rejoin. *Boone v. Eyre*, 1 H. Bl. 254.

Difference between issue and paper-book.

In the Common Pleas, it is always called the *issue*, and is made up by plaintiff's attorney. So it is in the King's Bench, when the proceedings are by original, or if by bill, when there are no special pleadings; but when the proceedings are by bill in the King's Bench, and there are special pleadings, they are then engrossed and copied by the clerk of the papers, and it is thence called the *paper-book*.

When issues made up by attorneys in B. R.

The cases in which the attorneys themselves make up the issue in the court of King's Bench, if the proceedings are by bill, are, whenever the general issue is pleaded to the declaration, or some plea tantamount thereto, as not guilty to a new assignment of trespass—*liberum tenementum*—*compervit ad diem*—*nul tiel record*—and in covenant, whenever defendant pleads to the country. In every special *non est factum*, every *de injuriâ suâ propriâ* to *sons assault demesne*, and when there is a general demurrer to a declaration. Also in all replacers, and in all issues and demurrers upon writs of error, *scire facias*, and *audita querela*. The above pleadings not being deemed *special*.

Book side of the office, why so called.

These pleas were formerly entered in a *book*, kept for that purpose at the King's Bench office; and therefore it is said, that in B. R. the attorneys themselves may always make up the issues, where the issue is to be given on the *book* side of the office. But now they are to be *delivered* to the opposite attorney,

attorney, no such book being kept, but only the general issue book, which is merely confined to general issues, strictly so called.

In all other cases in K. B. clerk of papers makes up the issue, then called, as above-mentioned, the *paper-book*.

The form of the issue in B. R. and C. B. somewhat varies, which is owing to the nature of the original jurisdiction of these two courts. The latter was established, and from its foundation intended as the court in which civil suits were to be prosecuted; but the original jurisdiction of the former was merely for criminal offences; and although by degrees it got cognizance of civil actions, yet they were deemed merely the bye-business of the court. They were entered, therefore, with a memorandum; and it is for this reason that memorandums are now used in the making up of the issues in B. R. but are never, except in particular cases, used in C. B. I say, except in particular cases, because, in all matters which are deemed the bye-business of that court, memorandums are, upon the same principle, made use of; such as proceedings by bill against their own officers, attorneys, and the like.

Form of issue in B. R. and C. B.

Why different as to the memorandums.

In a word, in both courts, whenever the proceedings are by *bill*, memorandums are inserted, when by original they are omitted.

Without making any distinction, therefore, between the two courts, we need only shew in what manner to make up the issue, when the proceedings are by bill, and when by original.

The chief distinction is, when proceedings by bill, and when by original.

When the proceedings are by bill,

Intitle the issue of the term in which issue is joined, let the declaration and plea be of what term they may; as,

How to make up issue when proceedings are by bill.

Michaelmas term in the 34th year of King George the Third (supposing the parties came to issue that term).

Then make a memorandum of the term in which plaintiff first declared, which memorandum, as issue is often joined long after the declaration, varies in four cases:

In what cases the memorandum varies.

1st, When the issue is joined in the same term with the declaration.

2d, When the cause of action arises within the term in which plaintiff declares; and then the declaration must be of a particular day in that term, and the memorandum also.

3d, When the declaration is of a precedent term to the issue, being joined, but not above four terms.

4th, When the declaration is above four terms before the issue is made up.

1st, How when
issue joined of
the same term.

When issue is joined of the same term in which declaration was, it is made up as follows :

Memorandum.

Michaelmas term in the 34th year of King George the Third (being the term issue was joined). *Mansfield and Way*.*

Declaration.

Middlesex, to wit; Be it remembered, that on Saturday next after the morrow of All Souls, (the first particular return of the term,) in this same term, before our lord the king at Westminster comes A. B. by Thomas Smith his attorney, and brings into the court of our said lord the king, before the king himself now here, his bill against C. D., being in the custody of the marshal of the marshalsea of our said lord the king, before the king himself, of a plea of trespass on the case (or whatever the action is); and there are pledges for the prosecution thereof, to wit, John Doe and Richard Roe; which said bill follows in these words, to wit; Middlesex, to wit, A. B. complains against C. D. being, &c. (reciting the whole declaration, omitting the pledges at the end thereof; and then in a new line begin the plea, it being of the same term with the declaration).

Plea.

And the said C. D. by E. F. his attorney, comes and defends the wrong and injury when, &c. (reciting verbatim the whole pleadings till issue joined, and then award the venire thus): Therefore (if there be more than one issue on defendant's plea; say, therefore, as well to try this issue as the said other issue or issues above joined, let) let a jury come before our lord the king at Westminster, on — next after fifteen days of Saint Martin; (the last day of term, if the cause is tried the sittings after; if in term, the first day of term; if in the country, the last day of the term;) and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties there.

Award of venire.

These &c.'s are contractions of the writ of *venire*, the form of which, *vide post* under the title "Of making up the Record for Trial."

2d, How issue
made up, if
cause of action
arose within the
term in which
issue is joined.

If the cause of action arises within the term in which plaintiff declares, and issue is joined in the same term, the memorandum must be of a particular day in term, so must the declaration also be intitled; and then the issue is made up thus :

Memorandum.

On Friday after the morrow of St. Martin in the 34th year, &c. Essex, to wit; Be it remembered, that on Saturday next after the morrow of St. Martin (some day certain in term after the commencement of the action) in the same term, before our lord the king at Westminster, comes, &c. (exactly as before).

3d, How, if de-
claration be of
precedent term
to that in which
issue is joined.

If the declaration is of a precedent term to the issue joined, then it is made up thus :

Hilary term (the term issue is joined) in the 34th year of the reign of King George the Third.

* In B. R. being the chief clerk's name; but if in C. B. put the prothonotary's name.

Suffex, to wit; Be it remembered, that in Michaelmas term last past, Memorandum.
(the term declaration is of,) before our lord the king at Westminster came A. B. by Thomas Smith his attorney, and brought into the court of our said lord the king, before the king himself then there, his bill against C. D., &c. (as before).

And after the declaration, begin a new line with the imparlance, thus:

And now at this day, to wit, on Monday next after the octave of Saint Hilary (the first day of the term issue is joined, make the imparlance to the term in which issue was joined, let it be when it may, provided it be a different one from that wherein plaintiff declared, otherwise there is no need of any imparlance) *in this same term, to which day the said C. had leave to imparle to the said bill, and then to answer the same before our lord the king at Westminster, comes as well the said A. by his attorney aforesaid, as the said C. by Thomas Smith his attorney; and the said C. defends the wrong and injury, when, &c. (inserting all the pleadings, and awarding venire as before).* Imparlance.

And if the declaration is of above four terms before the issue is joined, then the issue is made up thus:

London, to wit; Be it remembered, that heretofore, that is to say, in Trinity term in the 34th year of the reign of our sovereign lord the now king, before the king himself at Westminster came A. B., &c. (as above, making the imparlance to the term the issue is joined).

4th, How issue made up if declaration be above four terms before issue joined. Memorandum.

The above is the mode of making up the issue in both courts when the proceedings are by *bill*, but when the proceedings are by *original*, which they are in all common cases in C. B., and are often by special original in B. R., the issue is made up exactly in the same form in both courts, without any memorandum, in the following manner:

How to make up issue when proceeding by original in B. R. or C. B.

Mansfield & Way (the chief clerk's name, if in B. R.; if in C. B., the prothonotary).

Hilary term (the term in which the issue is joined, though the plea be delivered many terms back, make up issue of the same term in which it is joined) *in the 34th year of the reign of King George the Third.*

Middlesex, } C. D. late of Westminster in the county of Middlesex,
to wit; } gentleman, (according as he is named,) was attached
(or summoned, as the case is; and so on with the declaration to the end thereof).

And then begin a new line, and enter the pleadings (if there are special pleadings they should be entered in order, as named in the margin of the issue, plea, replication, rejoinder, &c.) and the award of the *venire*, (which is always the general return-day before the trial, if for the sittings

after term; if in term, then the first general return of the term,) observing the entry, if the issue is to be tried in the county palatine, or in case of a Welsh issue, to be tried in the adjacent English county.

Summary of
what necessary
to be stated.

Such are the forms of the issue in *ordinary* cases, whether the proceedings be by bill or original, from whence it appears, that all which is necessary to be stated is, 1st, The title of the term when issue was joined. 2d, A memorandum (if by bill, but if by original, it is omitted) of the term declaration was of. 3d, The declaration itself. 4th, An imparlance, provided the plea was not of the same term with the declaration, in order to avoid a discontinuance of proceedings, which imparlance is to be until the term issue is joined. 5th, The plea and replication until the issue. And 6th, the award of the *venire*.

How to make
up issue in par-
ticular cases.

But in *particular* cases the issue must be made up according to the fact; as when there are two or more issues, or where one defendant lets judgment go by default, and the other pleads, or where the issue is into a county palatine, or it is a Welsh issue, or where the sheriffs are interested, and the *venire* is awarded to coroners and the like; in all which cases there are special suggestions on the issue, and particular awards of the *venire*, as may be seen by the following forms:

Forms of awards
of *venire*.

Form of the awarding of the *Venire*.

Where two or
more issues.

Where there are two or more issues joined, then after the words, "and the said plaintiff doth the like," add these: "Therefore as well to try this issue as the said other issue above joined, the sheriff is commanded that he cause to come here, in fifteen days of Saint Martin, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well," &c.

If defendants
plead separately.

How to make up an Issue where the Defendants plead separately.

In this case, you add to each copy of the issue the two pleas, and join the *smiliter* to each, and then say: "Therefore as well to try the issue above joined against the said John Doe, as the said other issue above joined against the said Richard Roe, the sheriff is commanded that he cause to come here, in," &c. (as above).

If one lets judg-
ment go by de-
fault.

Go to the end of the plea pleaded by the defendant, and add the *smiliter* thereto; then say, "And the said Richard, in his own person, comes and defends the wrong and injury, when, &c. and says nothing in bar or pre-
clusion

" clusion of the said action of the said John, by which the
 " said John remains therein undefended against the said
 " Richard; for which the said John ought to recover against
 " the said Richard his damages by reason of the premises;
 " but because it is unknown to the court here what damages
 " the said John hath sustained by the means aforesaid; and
 " because it is also at present unknown to the court here,
 " whether the said Richard will be convicted of the premises
 " upon which the above issue is joined between the said
 " John and the said Richard or not; and because it is ne-
 " cessary and convenient, that there be but one taxation of
 " damages in this suit, therefore let the giving of judgment
 " in this behalf be stayed until the said issue between the
 " said John and Richard be determined; and as well to try
 " the issue above joined between the said John and Richard,
 " as to inquire against the said Richard what damages the
 " said John hath sustained in this behalf, the sheriffs are
 " commanded that they cause to come here, in eight days of
 " the Purification, twelve, &c. by whom, &c. and who
 " neither, &c. because as well," &c.

Unica taxatio

When the issue is in a *county palatine*, where the king's
 writs do not run, and must be tried by a jury of the palati-
 nate, the record is sent down by *mittimus* to the judges to be
 tried; and the award of the *venire* and *mittimus* are in the
 following form, with a suggestion at the beginning: "There-
 fore let a jury be made thereof; and because the issue
 " aforesaid, between the parties above joined, ought to be
 " tried by men of the *county palatine* of Lancaster; that is to
 " say, of the body of the said county where the writ of our
 " said lord the king doth not run, and not *elsewhere*; there-
 " fore to try the issue aforesaid, between the parties above
 " joined, let the record of the plaint aforesaid be sent to
 " his majesty's justices of the said *county palatine* of Lan-
 " caster; so that the same justices, by his said majesty's
 " writ of that county, to be duly made out, and to the
 " sheriff of the same county directed, do command the said
 " sheriff that he cause twelve good and lawful men of the
 " body of the said county of *Lancaster* to come before the
 " justices at their next general sessions of assize to be holden
 " for the said county, after the said record shall be delivered
 " to them, each of whom, &c. by whom, &c. and who
 " neither, &c. to recognize, &c. because as well, &c.
 " And when the verification and issue aforesaid shall be there
 " made and tried, that then the said justices shall send the
 " record of the plaint aforesaid, together with every thing
 " that shall be done thereupon before them, in his said
 " majesty's court, there to our said lord the king at *West-*

How if issue in
county palatine;

of the mittimus.

" *minster*,

" *minster*, at a certain day which the said justices shall appoint; the said parties to be in the same court, there to hear a judgment thereupon."

The Award of a *Venire* on a Welch Issue into the next English County, is in the following Form :

Award of venire
on a Welch
issue.

" And because the issue aforesaid, between the parties above joined, ought to be tried by men of the next English county to the said county of *Essex*, and not elsewhere; and because the county of *Essex* is the next English county to the said county of *Essex*; therefore let a jury of the said county of *Essex* come thereupon before our lord the king at *Westminster*, on *Monday* (some return-day before the trial), and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the said parties there."

In the record on a Welch issue, the *jurata* and *venire*, *distringas*, &c. are made up of the next English county into which the *venire* is awarded, as if the *venire* were laid in that county.

A Suggestion that one of the *Sheriffs* is interested, &c. by the *East-India Company* :

Suggestion by
East India Com-
pany that one of
the sheriffs is
interested.
Venire to the
other sheriff.

" And hereupon the said United Company say, that W. S. and R. W. Esqrs. are sheriffs of *London*; and that the said W. S. one of the said sheriffs, in his own right, is proprietor, and hath interest in and to a share and proportion of the principal stock of the said United Company, to the value of £. *1000*; and is a member of the said United Company, and this the said United Company are ready to verify; and for this cause the said United Company pray a writ to be directed to the said R. W. Esq. the other sheriff of *London*, to cause to come twelve, &c. to try the several issues between the said parties; and because the said Francis doth not deny the aforesaid allegation of the said United Company, but acknowledgeth the same, it is granted to them, &c. Therefore let a jury," &c.

Suggestion that the Sheriff is of Kin to the Defendant.

Suggestion that
sheriff is of kin
to defendant.

" And hereupon the said A. B. says, that I. W. Esq. is sheriff of the said county of *E.*, and that the said C. D. is of kin to the said I. W. in this; that one I. D. junior, son of the said C. D., married and took to wife one I. W. who is yet alive, the daughter of the said I. W. sheriff of the county aforesaid; and for this cause he prays a writ of our lord the king of *venire facias*, to be directed to the

Venire to coron-
er.

" coroner

"coroner of the said county of *E.*, and because the said
 "C. D. doth not deny the aforesaid allegation of the said
 "A. B. it is granted to him, &c. Therefore it is commanded
 "to the coroner of the said county of *E.* that he cause to
 "come here twelve," &c. &c.

Suggestion that the Sheriff and Coroner are Parties, and
Venire to Elisors.

"And hereupon the said Anthony says, that A. B. and
 "C. D., now sheriffs of the city of *Coventry* and county of
 "the same city, are bailiffs of the city of *Coventry* aforesaid,
 "and therefore parties to the matter aforesaid above, be-
 "tween him the said Anthony and the said Thomas, put
 "in issue, and that Simon Burton, now coroner of the said
 "city of *Coventry* aforesaid, and therefore likewise a party
 "to the said matter above, between the said Anthony and
 "the said Thomas as aforesaid, put in issue; and the same
 "Anthony prays a writ of the lord the king to be directed
 "to two discreet and indifferent persons within the said
 "county of the city of *Coventry* aforesaid residing, by the
 "court here to be elected, to cause to come twelve free
 "and lawful men of the neighbourhood of *Wichen* in the
 "said county of the city of *Coventry* aforesaid, to try the
 "issue aforesaid, between the parties aforesaid above as
 "aforesaid joined: and because the said Thomas Laurence
 "doth not deny the allegation aforesaid, therefore E. H.
 "and A. L. (with the agent of the parties aforesaid by the
 "court here elected and named) are commanded that they
 "cause to come before the lord the king at *Westminster* on
 "next after twelve, &c. by whom, &c. and
 "who neither, &c. to recognize, &c. because as well, &c.
 "The same day is given to the parties aforesaid there," &c.

Suggestion that
 sheriff and co-
 roner are parties.
Venire to eli-
 fors.

Where Party died after one *Venire*.

"Therefore the sheriff is commanded that he cause to
 "come before the lord the king, from the day of St. Mi-
 "chael, in three weeks wheresoever, &c. twelve, &c. by
 "whom, &c. and who neither, &c. to recognize, &c. because
 "as well, &c. The same day is given to the parties aforesaid, &c. Before which day, to wit, on the day of
 "in the year of the reign of the said lord the
 "now king, the said Theodore died, and the said James
 "survived him; and now at this day, before the said lord
 "the king at *Westminster*, comes the said James and Walter
 "by their attornies aforesaid, and the sheriff aforesaid hath
 "not returned the said writ thereof, nor done any thing
 "therein:

Suggestion of
 death of party,
 after awarding
 one venire and
 another award-
 ed.

" therein: therefore, as before, the sheriff of the county
 " aforesaid, is commanded that he cause to come before
 " the said lord the king in the octave of St. Hilary, where-
 " soever, &c. twelve, &c. by whom, &c. The same day is
 " given to the parties aforesaid," &c.

Verdict set aside, and *Venire de novo* awarded.

Verdict set aside
 and venire de
 novo awarded.

" And hereupon the record and verdict aforesaid being
 " read and heard, it seems to the justices here, that the
 " jurors aforesaid have misbehaved themselves in giving the
 " verdict aforesaid, so that that verdict is idle and void in
 " law: therefore it is considered that the verdict aforesaid
 " be held as idle and void, and had for nothing; and the
 " process against the jurors first impanelled being omitted,
 " and that panel being entirely withdrawn, the sheriff is com-
 " manded that he cause to come anew here, in the octave of
 " the Purification of the Blessed Virgin Mary, twelve, &c.
 " by whom, &c. and who neither, &c. to recognize, &c.
 " because as well," &c.

How issue to be
 engrossed, in-
 dorse, and
 charged for.

Where the issue is made up as above directed, it must be engrossed on
 treble 1d. stamp paper; indorse thereon the charges which are in

B. R.

C. B.

4d. per folio, (72 words,) be-
 sides stamps, and entering plea, 1s.

4d. per folio, (72 words,) and
 duty entering plea, if the general
 issue, 2s.; if special, 8d. per
 folio.

If appearance entered according
 to statute, charge it on back, which
 must be paid for.

In both courts, if declaration be delivered and not yet paid for, charge
 for same and for warrant, thus:

For declaration unpaid, so much.

Upon the back of the issue you may give notice of trial.

How issue to be
 delivered.

This issue is to be delivered to defendant's attorney. Formerly judg-
 ment might be signed if he did not pay for same within twenty four hours;
 but now, by rule of court Hil. 35 G. 3. no judgment can be signed on this
 ground, but the issue money remains to be taxed as part of the costs in
 the cause. 6 D. & E. 218.

Of the paper-
 book, how
 made out, &c.

If there are special pleadings, the clerk of the papers must
 make out the issue (then called the paper-book). Let plain-
 tiff's attorney then deliver a copy of the declaration on un-
 stamp paper to the clerk of the papers (as he has only the
 pleadings in his office from the declaration); he will then
 make out the paper-book, which is nothing more than the
 pleadings at length, transcribed upon a treble 1d. stamp
 paper,

How charged
 for;

paper, with the names of the respective counsel who signed the different pleadings, &c.; but, instead of being a close copy thereof, as the issue is, there are only 72 words in a sheet. In the margin of the paper-book is a rule for defendant to receive and return it on a certain day therein mentioned, which is always four days, exclusive of the day it is delivered (charge 8*d.* per folio for the whole, and 4*d.* for the pleadings from the indorsed declaration, as also the stamps); deliver paper-book to defendant's attorney, with notice of trial indorsed, keep copy thereof. If returned according to rule, (for it need not now be paid for,) proceed to trial; but if not returned, sign judgment as for want of a plea, and proceed to execute inquiry (if necessary); the notice of trial will serve for the notice of inquiry, only give notice of the time and place of executing it.

delivered;

indorsed;

returned;

Defendant pleaded and delivered plea to plaintiff's attorney, who made up the issue and delivered it to the defendant's attorney, who paid for it; but finding afterwards it should have been made up with the clerk of the papers, (it being in B. R. and the pleadings special,) went and paid him his fees, then made up the record and went to trial, and the court refused to set it aside, the defendant being in the first fault in not leaving the plea at the office. *Thomson v. Tiller*, Str. 1266.

How if made up by attorney by mistake, instead of clerk of papers.

(B) Of striking out Pleadings, and demurring or pleading general Issue.

(B)

Where there are special pleadings in a cause, and the defendant would delay the plaintiff and prevent the expence of a trial, when issue and the paper-book is delivered to him, he may scratch out the *similiter* joined, and leave a demurrer to the plaintiff's replication in the office, and when the time is out, return the book, with notice thereof, in this manner:

Of striking out *similiter* and demurring.

Mr. J. M.

I have struck out the rejoinder, and left a demurrer to the plaintiff's replication in the office.

Or in C. B. he may strike out *similiter*, and return issue, with notice indorsed that he will file a demurrer in the office; in which case plaintiff will be obliged to give a rule to rejoin. Imp. C. B. 318.

But, to prevent this trick, the plaintiff, if he is apprehensive that the defendant's plea is dilatory or frivolous, should move the court that the defendant abide by his plea, or plead another *instantier*, or by a certain given hour the next

How this delay to be prevented.

day. However, should it be practised, the paper-book must be carried to clerk of papers to have demurrer and joinder added; it is then delivered again to the attorney, who must return it in 24 hours (but he need not pay for the entries as above mentioned, it is now called the demurrer-book); if not returned, judgment may be signed; if returned, enter an *incipitur* on the roll, move for a *concilium*, and proceed in all respects as in common cases of demurrer, for which see *ante*, Chap. 8. Sec. 1.

Rule as to same,
notice of trial
for special issue
serving for the
general issue;

Upon delivery of any paper-book wherein an issue is joined, and notice of trial given on the back of the book, if the same be afterwards waived and the general issue given, the notice which was given for the trial of the special issue shall serve for notice of the general issue. N. on R. Hil. 8 Geo. 1.

or for inquiry
on demurrer.

So if *similiter* struck out and demurrer given, and judgment given for plaintiff on the demurrer, the same notice which was given on the paper-book for the trial of the issue shall serve for writ of inquiry, only plaintiff must give notice of hour and place of executing writ. N. on R. Tr. 8 Geo. 1.

(C)

(C) Of delivering and returning Paper-Book.

In what time
paper-book to
be delivered and
returned.

If made up in
term or within
four days after;

If a paper-book be made up and delivered in term time, or within four days exclusive after term, with a rule thereon given by the clerk of the papers for bringing the same book to be enrolled, and the defendant's attorney doth not within four days after the delivery thereof bring back the book and join with the plaintiff in the special issue or demurrer made up, or waive his special plea and give the general issue or demurrer to any special issue tendered, judgment may be signed and entered as if no plea had been pleaded. N. on R. Tr. 1 Geo. 2.

If not in term,
but within eight
days after.

But where a plea is not put in in time, so that a paper-book may be made and delivered in term, or within four days after, yet if it be made up and delivered within eight days after the term, the defendant's attorney shall be obliged to take it and return it again in four days after the delivery, or judgment may be signed.

If a London or
Middlesex
cause.

If a plea be pleaded in term, or in time after the term, and the paper-book is not made up and delivered within eight days exclusive after term, if it be an issue to be tried in London or Middlesex, or a demurrer, the other party is not bound to deliver back the book till within the first four days of the next term; but if it be an issue to be tried at the assizes, the defendant's attorney shall deliver back the book within

If to be tried at
the assizes.

within four days after the delivery thereof and join in the special issue, or give the general issue and take notice of trial, or else the plaintiff's attorney may sign judgment by default as if the defendant had not pleaded. But in all cases if the plaintiff's attorney accept the book after the limited time, he cannot sign judgment.

The four days allowed for returning the paper-book are in all cases, whether the issue be in fact or in law, to be reckoned one exclusive and the other inclusive.

If defendant do not return the paper-book on the evening of the fourth day, plaintiff may sign judgment; it is a mere indulgence to allow him till the next morning. *Hafelar v. Anfel*, Doug. 197.

Although in the case of *Oxley v. Bridge*, Doug. 67. not long before it was decided *contra*; but *per* Lord Mansfield, there must have been particular circumstances attending that case, and here the Master has certified the above to be the practice. *Ib.*

If, therefore, the rule expires on Saturday, and paper-book be not returned till Monday morning, though before the opening of the office, plaintiff may refuse to receive it, and immediately sign judgment. *Thomson v. Ryal*, 4 T. R. 195.

The issue must be delivered to the attorney or agent in town, and not to the attorney in the country; after an agreement to deliver it to a country attorney, it was tendered to agent in town, who refused payment, and judgment was signed and held regular. *Cooke's Rep.* 94.

For such agreement to deliver the issue in the country is void. *Bar.* 251. *Hafelfoot v. Duke*.

It is now settled that the issue or paper-book need not be paid for at the time of delivery by following rule of court, *H.* 35 Geo. 3.

It is ordered, that after the first day of the next term no judgment shall be signed for nonpayment of issue-money; but that the issue-money shall remain to be taxed as part of the costs in the cause. *6 D. & E.* 218.

Which rule has been determined to extend to paper-books and demurrer-books as well as issues. *Fuller v. Osborne*, *6 D. & E.* 477.

So that it is needless to insert any of the cases in the books respecting signing judgment for nonpayment of issue-money.

(D) Of Variance between Issue and Pleadings and amending same.

The issue should be intitled of the term when issue was joined; but the memorandum should be of the term the declaration

How the four days reckoned.

Judgment signed if not returned in time.

Plaintiff may refuse to receive it though judgment not signed.

To whom issue to be delivered.

It is now settled that no judgment can be signed for nonpayment of issue-money.

Rule Hil. 35 G. 3.

extends to paper-books and demurrers.

(D)

claration was of; and if the cause of action arose any time after the first day of term, the memorandum should not be generally of that term, as *Michaelmas term in the 30th year of the reign of King George the Third, or the like*, but of a particular day in term, as of *Friday next after the morrow of All Souls*; which day should be a day after the cause of action actually arose.

How it operates
as to a tender
made in term.

If, therefore, defendant pleads a tender before the exhibiting of the bill, and plaintiff, in order to oust him of the benefit thereof, makes up paper-book with a general memorandum which relates to the first day of term, and would be prior to the tender; on motion upon an affidavit of the fact, court will order a special memorandum to be made. *Smith v. Key*, Str. 638.

Issue, how far
amendable.

Sometimes, indeed, the issue is in such cases amendable. In assault and battery, the memorandum was generally of Michaelmas term, and the fact, on *son assault* proved, was on a day within the term, and it was held well enough; for the plaintiff need have given no evidence on this plea, unless to aggravate damages; and the court will not nonsuit him, because it is amendable by a new bill. *Guy & ux. v. Kitchiner and others*, Str. 1271.

But memorandum was held not amendable to a special day in term after a plea in abatement, and demurrer and *respondens* ouster awarded. *Burgefs v. Periam*, Ld. Ray. 324.

Though in the case of *President and College of Physicians v. Salmon*, Holt C. J. said, that memorandum was no part of declaration, and might be amended. Ld. Ray. 683.

Memorandum
must not vary
from pleadings.

So memorandum should agree with declaration, and not say in a plea of debt when declaration is in a plea of covenant or the like; but in such case memorandum is amendable. *Davis v. Stringer*, Carth. 354.

The words of a
plea, &c. not
necessary.

Though the words *de placito*, &c. are usually inserted, yet as the bill itself is afterwards set forth in *hæc verba*, they are not absolutely necessary; as was determined in C. B. where, in proceedings by bill, the like memorandum is used, Trin. 7 & 8 Geo. 2. *Atkin v. Worthington un. &c.*; and in B. R. on writ of error from C. B. Mich. 11 Geo. 2. *Goofrey v. Reynolds*, Andrews 23.

If new trial ob-
tained, the me-
morandums
should not be
altered, but same
roll should be
proceeded on.

In *assumpsit*, after verdict for plaintiff, a new trial was granted on payment of costs and bringing the money into court, and the rule was to try the same issue. The plea roll in that action was of Easter term; and by the memorandum it appeared, that the bill was exhibited in Hilary term before: but on the new trial, the plaintiff did not proceed upon the same roll, but made up the plea roll as of Michaelmas term, and a memorandum of a bill of Trinity preceding. New trial was had, and plaintiff had a verdict again; but

but it was set aside for irregularity, the plaintiff not having tried the same cause as it now appeared to be, and had not pursued the rule for a new trial, which was to try the same issue as was tried in the first action. *Harpur v. Davy*, Carth. 498.

If there has been a plea in abatement and judgment of *respondeas ouster*, after which the defendant pleads in chief, yet the plea in abatement ought to be entered in the issue and *nisi prius* record; for, as it is in the plea-roll, it must be mentioned in the *nisi prius* record; for otherwise it would not appear to be a trial in the same cause, and judgment would be arrested. *Dobertum v. Chancellor*, Ld. Raym. 329. Carth. 447. 5 Mod. 399.

A plea in abatement, which had been demurred to, but never deserted, nor any judgment had upon it, was omitted in the plea-roll between the declaration and the plea of *nil debet*; and the court held that this irregularity was cured, by defendant's accepting the issue and paying for it: his objection should have been at that time, it is too late now; meaning in arrest of judgment or on motion for a new trial. *Combe v. Pitt*, Burr. Rep. 1682.

If, therefore, the issue is not agreeable to the declaration, but any variance therein, defendant should refuse to accept it; for otherwise plaintiff may make up the *nisi prius* record right, and go on to trial; and, though no defence made by reason of the variance, court will not set aside verdict. *Shepley v. Marsh*, Str. 1131.

Motion to amend the issue-roll by striking out the award of the *venire facias* by *decem tales*, and awarding the common *venire facias*. But there being nothing to amend by, no rule was made. *Cartwright v. Gardener*, Bar. 7.

Rule was made absolute, giving plaintiff leave to deliver a new issue properly intitled; in the title of the issue already delivered, the word (George) was omitted. It stood thus: Hilary Term, 20th of King the Second. *Beaumont v. Stuart*, Bar. 18.

The want of a similiter was formerly held not aided or amendable. Str. 641. *Cowper v. Spencer*, S. C. 8 Mod. 376.

But a rule was since made absolute to amend the record after verdict, by adding the words, "And the defendant does so likewise," at the end of the replication, instead of, &c. a prior rule having been obtained to shew cause why judgment should not be arrested for that defect; which latter rule was discharged. *Sayer v. Pocock*, Cow. 408. *Walker v. Lester*, Com. 366. *Harvey v. Peake*, Burr. 1793. The issue and *nisi prius* roll may be amended by the plea-roll. *Tourville v. Nash*, Say. 76.

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D d

If

Where there has been a plea in abatement, it should be entered in issue;

but if omitted in plea-roll, it is too late to object after issue accepted.

In case of any variance, defendant should refuse to accept issue.

Of withdrawing and amending issue.

If after the issue is delivered to defendant, plaintiff's papers are mislaid, court will order defendant to give him a copy to enter it by. *Wiar v. Smith*, Str. 414.

(E)

(E) Of the Continuances on Issue Roll.

Of entering continuances on the roll.

Want of continuance in the issue-book delivered may be entered at any time on the roll.

In a proceeding by bill in C. P. against a member of parliament, which was of Easter term, and in Trinity following he pleaded the general issue, whereupon issue was joined of that term; the paper-book of the issue was made up and delivered, whereby all the proceedings in the cause appeared to be of Trinity term, without any continuance from Easter to Trinity, or any *alias prout patet*, which is irregular; it was moved that the issue, as delivered, might be set aside for irregularity: *per Cur.* this is a nice objection, it is mere matter of form; and we think the continuance, or *alias prout patet*, are not necessary in the issue-paper, it may be entered at any time upon the roll; so the rule to shew cause was discharged. *Wilkes v. Wood*, M. P. 2 Wil. 203.

The declaration was not delivered four days before the end of the term, defendant pleaded to the jurisdiction of the court, and (as he might by the course of the court) pleaded it within the first four days of the subsequent term. The clerk, to avoid the trouble of making up the post roll, entered it with a special imparlance as of the subsequent term, which spoiled the plea; but the clerks were ordered to make up post rolls, and not to use these special imparlances, which Holt C. J. said were crept in of late, and were not known formerly. Salk. 367. 2 Ld. Raym. 1208.

On demurrer to a declaration, one exception was, that the action was discontinued because the declaration was of Michaelmas term, and the plea-roll of Easter; and there is no continuance from Michaelmas to Hilary, and from thence to Easter, *sed non alloc.* because, by the course of the King's Bench, they never enter continuances until the plea comes in, though the declaration was delivered four terms before. *Curlewis v. Dudley*, Ld. Raym. 872. Salk. 179.

Though it is the practice to make up the issue and enter it on a roll of that term in which the plea was delivered, yet it has been held, that a plea delivered in one term may be entered as of the subsequent term, with an imparlance; as where,

In debt on bond, plea as to part payment and demurrer *inde*, on which defendant moved, that the action by the demurrer was discontinued, the plea being only to part, and therefore plaintiff ought to have taken judgment by *nil dicit* as to the residue. The court were going to give judgment for the defendant, when it was observed, that the plea was of this term, and therefore plaintiff might still take his judgment by *nil dicit* for the residue: on which defendant alleged

alleged, that the plea delivered was of the last term, and therefore the record ought to have been made so; but the clerks certifying that it being only a plea to enter, the record might be made up either way; wherefore the court would not order it to be examined, but said there was trick for trick. *Market v. Johnson*, *Ld. Raym.* 1121. *Salk.* 180.

It was resolved in *Wymark's case*, 5 Rep. 75. that the course of the King's Bench is, (*i. e.* in suits by bill,) that although the plaintiff after a bar pleaded have day to reply two or three terms, no mention shall be made in the roll of any imparlance or continuance; but otherwise between the declaration and plea in bar there, if that is of another term, for that shall contain the imparlance or continuance; but no such entry is made upon any replication, rejoinder, &c.; wherefore they shall be intended, when they are generally entered of record, that they were made in the same term in which the bar, &c. was pleaded; and by consequence here the plaintiff may take advantage of a condition contained in a deed pleaded by defendant with a proferit *in curia* of a precedent term.

If the plea, therefore, is of two or three terms subsequent to the declaration, as if declaration is of Michaelmas term, plea of Easter, and you try the cause of Trinity, imparle over to the first day of Trinity, and make up your issue as of that term, for the want of a continuance-day cannot be assigned for error in this case. *Stat. Jeof.* 32 H. 8. c. 30. 4 & 5 Ann. c. 16. *Imp. K. B.* 330.

(F) Of entering the Issue.

(F)

In order to compel plaintiff's attorney to enter issue,

Of entering the issue.

*In B. R.**In C. B.*

Get a rule from the master on the back of the issue delivered, enter it with the clerk of the rules, pay 1s. 10d. and serve plaintiff's attorney with a copy, naming the cause; as A. v. B. Friday next after the morrow of the Ascension to enter the issue entered; he must before rule is out, enter the issue on the roll in same manner as explained, *post*, Chap. xi. Sec. 4.

Get treasury rule from secondary for him to enter issue on record within four days after notice given, pay 4s. 6d.; serve copy thereof on plaintiff's attorney, if not docketed and carried in before rule is out, sign non pros.

How to compel entry of issue.

But if plaintiff wishes to docket and carry in entry, let him get a roll from the prothonotary's of term in which issue is joined; make out (a)

(a) In the Common Pleas, Michaelmas term, in the 34th year of the reign of George the Third, Middlesex to wit, Richard Tenn puts in his place T. S. his attorney, against John Denn, late of, &c. yeoman, in a plea of trespass on the case.

Warrant of attorney for plaintiff.

Middlesex to wit, The said John Denn puts in his place T. S. his attorney, at the suit of the said Richard in the plea aforesaid.

The nature of the action must be expressed on the warrant of attorney.

The like for defendant.

In K. B. also these warrants are entered on the roll.

and

D d 2

warrants

and file same in treasury, or defendant may sign non pros.

warrants of attorney of same term on a plain piece of parchment, file them at warrant of attorney's office, pay in debt 8d., in case 1s. 4d., then take roll to prothonotary's, pay for entries 8d. per sheet, and docket same.

By R. M. 5 Ann. no record of *nisi prius* can be sealed or passed at *nisi prius* office by *custos breviarum* before issue be entered, or an *incipitur* thereof, and such entry with *nisi prius* record be first brought to and signed by secondary of this court, for which no fee to be paid but usual fee to clerk of court for entry of issue.

When issue ought to be entered.

Issues ought to be entered of the term they are joined; but if not entered of that term, it is no reason to set aside the verdict. Prac. Reg. 232.

At what time defendant may give rule for that purpose.

If the action is laid in London or Middlesex, the defendant ought not to give a rule for the plaintiff to enter his issue the same term in which issue is joined, unless notice of trial has been given. In a country cause the plaintiff is nowise bound to enter his issue the same term it is joined. Note on Reg. Mich. 4 Ann.

If venue in country.

If in London or Middlesex.

But, if the action is in London or Middlesex, the plaintiff must enter his issue, and bring the record into the office, within four days after notice of the rule for that purpose; and if in the country, before the continuance of that term, or judgment of *non pros* may be signed. Ibid.

How time of the rule to be reckoned.

A *non pros*, signed for want of plaintiff's entering the issue, was set aside, as irregularly signed one day before the time limited by the rule for entering the issue expired. The rule runs, "Unless plaintiff, within four days next after notice shall cause the issue to be entered," which *excludes* the day of notice. The rule was served on Friday, and the issue-roll brought in on Tuesday following, on which day the *non pros* was signed. *Margarum v. Fenton*, Bar. 318.

If papers mislaid, court will compel defendant's attorney to give a copy of issue.

Plaintiff's attorney had delivered the issue, but not going on to trial, defendant's attorney gave him a rule to enter the issue, and on affidavit made by plaintiff's attorney that the papers were mislaid, the court ordered the defendant's attorney to give him a copy of the issue, in order to enable him the better to comply with the rule. *Wiar v. Smith*, Str. 414.

If judgment for want of entering issue, it may be by *nil dicit*.

If judgment is signed for want of entering the issue, or not returning the paper-book, it should be by *nil dicit*.

If no proceedings after issue entered, judgment

If plaintiff, after having entered his issue, do not try the cause, or proceed to trial thereon some time during the next term after that in which issue was joined, judgment as in case

case of a nonfuit may be moved for. *Baker v. Newman*, 1 T. B. 123.

ment as in case of a nonfuit.

But if issue be joined early in term, notice of trial must be given in the same term. *Frampton v. Payne*, 1 T. B. 65.

When to be moved for.

For the time when plaintiff ought to proceed to trial after entering issue, *vide tit.* Judgment as in case of a nonfuit.

The plaintiff had a four-day rule to bring in the issue-roll, which expired the 14th of June last; the defendant on that day searched in the office, and the roll not being then brought in, signed judgment of *non pros* the next day at twelve. The fact was, that the roll was brought in the next morning before judgment signed, and the judgment was held irregular for want of defendant's making another search at the time he signed the judgment: defendant might, indeed, have signed judgment immediately on the first search, but having waived that advantage, plaintiff might bring in the roll any time before judgment actually signed, as in case of a plea, and the like. *Minns v. Baster*, 2 D. & E. 16.

Whether if issue roll brought in any time before judgment actually signed, though not in time of the rule, judgment may be afterwards signed.

But now in the case of a plea or the like, the other side may refuse to receive it after expiration of rule, though judgment not signed, as determined in *Thompson v. Ryal*, 4 D. & E. 195. *Qu.* How far that case applies to entering the issue, or tends to invalidate the decision in *Minns v. Baster*?

SECTION II.

Of Notice of Trial, and countermanding same; and of Costs for not proceeding to Trial.

(A) What Notice is necessary—

1. *In Town Causes.*
2. *In Country Causes.*
3. *If under Terms to take short Notice.*
4. *When no Proceedings for four Terms.*

(B) When Plaintiff is compelled to give Notice of Trial.

(C) Of the Form of the Notice, how and to whom to be given.

(D) Of continuing Notice of Trial.

(E) Of countermanding Notice of Trial.

(F) Of Costs for not proceeding to Trial.

(A)

(A) What Notice necessary—

1. In Town Causes.

What notice
necessary.
10. In town
causes.

By an old rule of court in the Common Pleas, Mich. 1654, if the *venue* is in London or Middlesex, and the defendant lives within forty miles of London, there must be eight days notice of trial, exclusive of the day it is given; and if he lives *above* forty miles from London, there must be fourteen days notice exclusive.

Although by several rules of court, as Mich. 1651, and Mich. 4 Ann. and others, *due* notice of trial is ordered to be given; yet there does not appear to be any other rule specifying *what* notice, except that of Mich. 1654, in C. B.; which practice has also been adopted in the King's Bench.

Statute 14 G. 2.
c. 17. explain-
ed.

But by statute 14 G. 2. c. 17. s. 4. it was enacted, That no cause whatsoever shall be tried at the sittings in London or Westminster where the defendant resides above forty miles from the said cities respectively, unless notice of trial in writing has been given at least ten days before such intended trial.

But as there are no negative words in the statute, namely, that there shall be *no more* than ten days notice, and as before this statute, defendant in such case was entitled to fourteen, it has been held that, notwithstanding the statute, fourteen days notice must be given, agreeable to the former rule of court. *Bowler v. Jenkin*, Bar. 305. So that now, in all town causes, if defendant resides within forty miles, eight days notice of trial, if above forty miles, fourteen days notice of trial must be given.

But in the Common Pleas, in all causes to be tried at Guildhall, the following rule of giving notice of trial must be observed:

New rule in
C. B. as to
giving notice of
trial in causes to
be tried at
Guildhall.

“Whereas parties are often put to unnecessary expence
“and inconvenience by reason of the uncertainty of the
“notice of trial for the sittings after term at the Guildhall,
“London, and likewise by reason of the late passing of the
“records with the clerk of the treasury, and of entering
“the causes in the marshal's book for the sittings after term
“in London and Middlesex: It is therefore ordered, That
“in every such notice of trial to be given for the sittings after
“term to be holden at the Guildhall, London, the plaintiff
“shall specify in such notice whether he means to try the
“cause at the first day of the sittings or at the adjournment
“day; and if the notice shall specify that the cause is not

"to be tried till the adjournment day, it shall be sufficient
 "to give such notice eight days before the first day of the
 "sittings after term, where the defendant or defendants re-
 "side above forty miles from the said city of London; and
 "four days before the said first day, where the defendant
 "or defendants reside within that distance." R. Hil.
 32 G. 3.

Fourteen days notice must be given, if defendant reside
 above forty miles distant as above-mentioned, although he
 was arrested in London and *venue* laid there, and after arrest,
 and before declaration, he went to Scotland, and although
 his attorney in London afterwards accepted declaration, and
 pleaded thereto. *Brind v. Norris*, 2 Blac. 1205.

So if defendant's abode is in Ireland, *Gorman v. Bayle*,
 Bar. 297. or in India, *Douglas v. Ray*, 4 D. & E. 552.

On such notices, the distance from London is taken by
 computed miles, not by admeasurement, though so many
 may be paid for post. *Bates v. Pettipher*, Str. 954. *Osgood*
v. Lyon, Ib. 1216.

But if there are several defendants, all must reside above
 forty miles off, for if any one reside within that distance, so
 long a notice is not necessary. *Per Ash. J. in Perry v. Jack-*
son, 4 D. & E. 520.

In all country causes to be tried at the assizes, ten days
 notice of trial at least is necessary. Statute 14 G. 2. c. 17.
 s. 4.

As to the mode of reckoning the days, whether in town
 or country causes, the day of giving the notice is reckoned
 exclusive, and the sitting day in town, or commission day in
 the country, inclusive.

If the sitting day in Middlesex be the 14th, notice of
 trial on the 6th is good notice; and in a country cause, if
 commission day be the 4th March, and the February preced-
 ing has only twenty-eight days, notice on the 22d of the
 said February is good.

Sunday is to be reckoned as a day, unless it is the day
 on which the notice is given.

Sometimes the defendant is under terms to take short no-
 tice of trial; in which case, if it be a town cause, two days
 notice of trial must be given. *Butler v. Johnson*, Bar. 301.
 If it be a country cause, such notice shall be given four days
 at least before the commission day, one day exclusive, and the
 other exclusive. Reg. East. 30 G. 3. 3 D. & E. 660.

This rule of court only extends to cases where defendant
 is under a judge's order to take short notice.

In all causes wherein no proceedings have been had for
 four terms, exclusive of the term in which the last proceed-

D d 4

Fourteen days,
 if beyond forty
 miles.

If in Ireland or
 India, notice of
 notice, having
 How distance
 reckoned.

All the defend-
 ants must so re-
 side.

2d, In country
 causes what no-
 tice necessary.

Notice reckon-
 ed one day in-
 clusive, one ex-
 clusive.

Sunday how
 reckoned.
 3d, If under
 terms to take
 short notice.

4th, What no-
 tice where no
 proceedings for
 four terms.

ings were had, a whole term's notice of trial must be given. East. 13 G. 2. N. on R. 4 Ann.

So that where plea was delivered Hilary term 1783, and no proceedings had till 10th March 1784, when issue was delivered, and ten days notice of trial given for next assizes at Lancaster, it was said by the master, that a whole term's notice should have been given. Imp. B. R. 338.

If must be a full term's notice.

Where a term's notice is requisite, such notice must be given before the *essoin* day of the term; it is not sufficient if after *essoin* day, though before the first day in full term. *Bogg v. Rise*, Str. 1164. *Geale v. Chapman*, Bar. 291.

But not necessary if any proceedings had; as notice of trial given, though countermanded;

But if any proceedings have been had within the four terms, such notice is not necessary.

As where notice of trial had been given at the end of half-a-year after issue joined, and then countermanded, there was no necessity of giving a term's notice till a year after such last notice and countermand. Str. 531. *Green v. Gauntlet*.

or concilium signed in the cause;

So if plaintiff take no step in the cause for three terms, and in the fourth sign a *concilium*, and obtains judgment in the fifth term, the signing a *concilium* is taking such a step as to make it unnecessary to give a term's notice. *Bland v. Darley*, 3 D. & E. 530.

or an order on a judge's summons.

So a judge's summons, if an order be obtained thereon, but not otherwise, is deemed a proceeding. R. East. 13 G. 2.

Nor necessary if cause delayed by defendant's request;

Again, the rule requiring a term's notice, only extends to voluntary delays by the plaintiff, and does not apply where the proceedings have been delayed at defendant's request. *Bosworth v. Philips*, Blac. 784. *Bland v. Darley*, 3 D. & E. 530.

or by injunction obtained by him;

Thus if defendant suspends the cause for a year by an injunction, and afterwards plaintiff proceeds to trial without a term's notice, and obtain a verdict, court will not set it aside. *Haley v. Riley*, Do. 71. *Bosworth v. Philips*, Blac. 784.

or by special agreement between the parties.

So if proceedings have been stayed by agreement for a limited time to enable defendant to pay the debt, on default of which plaintiff was to proceed; this is out of the rule of court, and in such case, at whatever stage of the cause the agreement might be made, the proceedings may be renewed at the expiration of the time without a term's notice, else it would, in effect, be a stay of proceedings for a whole term beyond the time agreed on. *Watkins v. Heydon*, Blac. 762.

(B) When

(B) When Plaintiff is compelled to give Notice of Trial.

(B)

By the practice of the King's Bench, although issue may be joined early enough in the term for plaintiff to give notice of trial for the sittings after or for the next assizes, he is not bound so to do; the rule being, that no notice of trial need be given until the term succeeding that in which issue was joined. *Hall v. Buchanan*, 2 D. & E. 734.

When plaintiff is compelled to give notice.

Not till the next term after issue joined.

In C. B. otherwise.

But in the Common Pleas, plaintiff must give notice of trial the same term, if issue is joined early enough in the term to give such notice. *Frampton v. Payne*, 1 H. Bl. 65.; but he has the whole of the next term after issue is joined to try his cause in. *Baker v. Newman*, 1 H. Bl. 123.

Nor can judgment as in case of nonsuit be moved for till the third term. *Da Costa v. Ledstone*, 2 H. Bl. 558.

Notice necessary, though day fixed for trial;

or plaintiff hath undertaken peremptorily.

Notice of trial must be given by the plaintiff, notwithstanding a special day is fixed for the trial by rule of court. *Ellis v. Trufler*, Blac. 798.

And although the plaintiff hath undertaken peremptorily to proceed to trial at the next assizes, yet it is necessary for him to give notice of trial: and if without such notice defendant attends with his witnesses, &c. and plaintiff does not proceed to trial, and defendant afterwards obtains judgment as in case of a nonsuit, he will not be allowed his costs for attending and subpoenaing witnesses and the like. *Isfield v. Weeks*, 1 H. Bl. 222.

(C) Of the Form of the Notice, and to whom to be given.

(C)

In (naming the court), between A. B. plaintiff, and C. D. defendant.

Take notice of trial in this cause for the sitting after this present Hilary term, to be holden at Westminster-Hall in and for the county of Middlesex, (or as the case may be, specifying if it be at the assizes, when and where to be holden, as for the next assizes to be held at in and for the county of)

Of the form of the notice, how and to whom to be given;

Yours, &c.

To ———, defendant's attorney.

Plaintiff's attorney.

This notice may be given on the back of the issue, or afterwards on a separate piece of paper.

on back of issue or piece of paper.

There is no settled precise form of notice required. It is sufficient if it apprises defendant with certainty that plaintiff means to proceed to trial; it is indifferent whether he says, I renew or I continue the former notice, (even though the former

No precise form requisite.

former

(B)

Not to write in
the issue book.

From this it is to
be seen, that

When plaintiff
gives notice
on the plead-
ings, and for
what it shall
serve.

From this it is to
be seen, that

To whom no-
tice of trial to
be given; first
to the attorney;
to defendant;

to the agent.

Attorney must
acquaint his
client thereof,
or attachment
will go.

(D)

Of continuing
notice of trial.

mer notice be a bad one and not capable of continuance,) provided there be sufficient time, according to the rules of the court, given by the last notice. *Tyte v. Steventon*, Blac. 1298.

At the back of the issue was written, Take notice of trial at the next assizes; and, though there was no date or county or attorney's name mentioned, yet, being indorsed on the back of the issue, the court held it good, but that it would not be so on a separate paper. *Henbury v. Rose*, Str. 1237.

If plaintiff concludes to the country on defendant's plea, he may give notice of trial on the back of the pleading, C. B. Trin. 2 Geo. 1.; and if the special plea be afterwards waived and general issue given, the notice which was given on the special issue shall serve for the trial of the general issue.

Notice of trial upon the issue shall serve for notice of executing a writ of inquiry if the book is returned with a demurrer, Hil. 8 G. 1. B. R. Hil. 6 G. 1. C. B.; but then plaintiff ought to give notice of the time and place of executing the inquiry.

Notice of trial must be given to defendant's attorney, or his agent, if he has appeared, or is known, *Lee v. Bradford*, Bar. 300.; but, if not known, it may be given to the defendant himself. *Harding v. Stafford*, Say. 133. *Higgins v. Stewart*, Cooke, 62.

If the notice of trial be given on the issue book, it must be given to the agent in town; because the issue can be delivered no where but in town; but, if given afterwards, it may be given either to the attorney in the country or the agent in town. So may countermands of notices of trial, or notices of executing writs of inquiry, or countermands. *Tasburn v. Havelock*, Bar. 306.

Defendant moved the court for an attachment against his attorney for not acquainting him that he had received notice of trial, whereby plaintiff obtained a verdict without defence. It appeared, on shewing cause, that the omission was owing to the neglect of the attorney's agent; but the court held that to be no defence for the attorney, as he is answerable to his client, and his agent to him; the party in this case ought not to be put to his action, but the matter should be determined in a summary way. Let an attachment go. *Collins v. Griffin*, Bar. 37.

(D) Of continuing Notice of Trial.

By R. Mich. 1654, C. B. and N. on R. in 4 Ann. B. R. if notice of trial be given in London or Middlesex for one sitting

(D) SEC. II.3 OF NOTICE OF TRIAL

sitting, and plaintiff be not prepared to proceed, if he give notice before that sitting that he will try it the next sitting, that shall be held a convenient notice.

The idea of *continuing* notices of trial arose from the above rules; which allow a plaintiff who has given notice of trial at one sitting, (but finds himself unprepared,) to give fresh notice for the next sitting, though the intermediate time should be less than the rules of the court require upon an original notice; but the word *continue* is not to be found in the rule, so that it is not a technical term, but a mere colloquial expression. *Tyte v. Steventon*, Blac. 1299.

A continuance, therefore, operates as a short notice of trial; for if there be time to countermand and give fresh notice, there is no occasion for a continuance.

Notice of trial, therefore, can only be continued in causes to be tried in London or Middlesex, as well, indeed, by the words of rule, as by reason of the thing; for in a country cause, if not tried at the first assizes, there is time to give fresh notice before the next. So it can only be (properly speaking) from one sitting in term to the next, or from the last sitting to the sitting after term; and not from the sittings after term to the sittings in the following term, as in such case there is time to give fresh notice, *Prac. Reg.* 396.; but yet where such notice of continuance was given, as the time was sufficient, the word *continue* was held not to vitiate it, and therefore it was deemed good. *Boys v. Twist*, Bar. 292.

The plaintiff cannot continue his notice of trial a second time; that is, he shall give short notice of trial but once. *Green v. Gifford*, Str. 1119.

Notice of continuance must be delivered within the same time as notice of countermand. Str. 1119.

There must therefore be two days notice of continuance, Monday for Wednesday. *Price v. Bambridge*, Bar. 297.

Plaintiff's attorney gave notice as follows: I hereby countermand my notice of trial given for the second sitting within this term, and continue the same till the third sitting, &c.; Defendant made no defence, and moved to set aside the verdict. *Per cur.*—After a notice is countermanded it cannot be continued, the verdict must be set aside. *Smith v. Hoff*, Bar. 301.

Proper notice of trial was given and countermanded; a second notice was given, but therein the name of the cause was omitted. The second notice was afterwards continued, and the name of the cause inserted in the continuance, and thereupon the cause was tried. The court was of opinion that

Its origin.

Its operation.

When continuance can be given.

How operate as fresh notice.

No continuance a second time.

At what time to be delivered.

Cannot continue after countermand.

A good continuance of a bad notice of trial, will not avail, though a former good notice of trial had been given.

that the second notice, being bad, could not be helped by the continuance, and set aside the verdict.

The form of notice of continuance may be as follows:

Form of con-
tinuance.

Mr. ———

Take notice, that I do hereby continue the notice of trial given you in this cause for the first sittings in this present Hilary term to the second sittings in the said term. Dated day of

To Mr. ——— Yours, &c.

Defendant's attorney.

T. S. plaintiff's attorney.

(E)

(E) Of countermanding Notice of Trial.

Of counter-
manding notice
of trial.

If the cause is to be tried at the sittings in London or Westminster, and defendant resides within forty miles of London or Westminster, two days notice of countermand before it is to be tried, is sufficient.

When notice
must be coun-
termanded.

But if the cause is to be tried at the sittings, and defendant does reside above forty miles, then six days notice of countermand is necessary. 14 G. 2. c. 17.

In all country causes to be tried at the assizes, six days notice of countermand is necessary. 14 G. 2. c. 17. The above is the time in both courts.

Different from
the old practice.

But before the above statute of 14 G. 2. the practice as to the time of countermanding in country causes was very different. In C. B. two days before commission-day held good, *Goodright v. Hoblyn*, Bar. 298.; and in K. B. four days before the assizes, *Whitlock v. Humphreys*, Str. 849.

How the days
reckoned.

The two or six days of countermand, as above, are to be reckoned one inclusive and the other exclusive. *Ibid.*

Not given on
Sundays.

No such notice must be given on a Sunday. *Dighton v. Dalton*, Cook 15.

Whether Satur-
day for Monday
good. Q.

But in C. B. notice of countermand, in a town cause, given on Saturday for the Monday was held good. *Stafford v. Thompson*, Pract. R. 395. But Mr. Impey, in his Practice of C. B. 331. doubts its regularity.

To whom to be
given.

A countermand of notice of trial may be given to the attorney in the country. *Tasburn v. Havelock*, Bar. 306.

The Form of Notice of Countermand.

In the
defendant.

(mention name of court), A. B. plaintiff, and C. D.

Form of coun-
termand.

Take notice, that I do hereby countermand the notice of trial given in this cause. Dated, &c.

Yours &c.

T. S. plaintiff's attorney.

To Mr. W. S. defendant's attorney.

After trial and verdict for plaintiff, defendant moved to set it aside for irregularity in notice of trial; but he had, since the verdict, given a rule to tax costs thereon. Gould and Nares Just. held that to be a waiver of the irregular notice; but no opinion was given thereon, as the officers of the court doubted, and judgment was given on another point. *Tyte v. Steventon*, Black. 1298.

Q. What a waiver of irregular notice?

If plaintiff give notice of trial, and does not proceed on that notice, by going to trial accordingly, or continuing, he cannot try the cause without new notice as before, unless by consent or rule of court. R. M. 1654.

When new notice necessary.

But if cause was made a *remanet*, no occasion for new notice, defendant is bound to attend till it is tried.

When not.

(F) Of Costs for not proceeding to Trial.

(F)

In case plaintiff gives notice of trial, and does not go to trial accordingly, the defendant upon motion shall have his costs of attendance, &c. taxed, unless the plaintiff countermand his notice in convenient time, or shew cause to be allowed by the court in excuse of such costs. N. on R. Mich. 1654.

Of costs for not proceeding to trial.

If plaintiff gives notice, and does not proceed to trial, whereby costs are taxed for defendant, and afterwards gives fresh notice, (perhaps with design to put defendant to further costs,) yet the court will not stay the trial till the first costs are paid, (except in ejectment,) because the defendant has remedy for them; and if the plaintiff should not try the cause pursuant to his second notice, the defendant will again have costs, and the like remedy to obtain them. N. on R. Mich. 4 Ann.; but see the case of *Smith v. Lidcot*, post (N).

How far court will stay proceedings on fresh notice till costs of first are paid.

If defendant enters a *ne recipiatur*, costs are to be paid, because the default is in plaintiff in not entering his cause in due time. *Duel v. Stow*, P. R. 406.

In what cases, and by whom costs to be paid.

If both plaintiff and defendant give notice of trial, and neither go on to trial, both will be entitled to costs. *Reading v. Grafton*, P. R. 405.

An executor plaintiff is liable to these costs, as well as other plaintiffs. *Ogle v. Moffatt*, Bar. 133.

Executor liable.

If a cause goes off *pro defectu juratorum*, or at a future trial defendant obtains a verdict, he shall be allowed on taxation the costs of the first attendance, &c. as either plaintiff or defendant might have prayed a tales; and this in both courts. *Sparrow v. Turner*, 2 Wil. 366.

But if there has been a regular countermand, no costs allowed.

When costs not allowed, if a countermand.

Or

If any excuse.

Or if plaintiff can shew a reasonable excuse.

As where it appeared that one material witness was served with a subpoena, and could not attend, and another was disabled by a fall from his horse, plaintiff not being guilty of any wilful default. *Ogle v. Moffatt*, Bar. 133. Or that two of his witnesses were disabled by the gout. *Jones v. Stephenson*, Ib. 316.

Costs not allowed for a witness who set out before countermand of notice of trial which was given in time. *Hester v. Hall*, Bar. 307.

If cause be a remanet.

Nor where the cause is made a remanet, or referred, unless agreed to abide the event of reference. *Bracher v. Cotton*, Cook 131.

Pauper not liable.

A pauper not liable to such costs, but you may move to dispauper him. *Taylor v. Lowe*, Str. 983.

If defendant obtains a rule for costs for not going to trial, he shall not have a rule for judgment as in case of a nonsuit. *Ogle v. Moffatt*, Bar. 316.

But if any subsequent laches is made, a judgment as in case of a nonsuit may then be applied for.

How to proceed for costs for not going to trial.

If defendant wishes to move the court against plaintiff for costs for not proceeding to trial, proceed as follows:

In B. R.

Prepare affidavit, stating, "That the action was commenced in Michaelmas term; that Hilary term issue was joined, and notice of trial given thereon for the sittings after the said term; and that plaintiff did not proceed to trial, nor countermand such notice."

Give brief to counsel, with affidavit annexed, to move for rule, which is granted in first instance, fee 10s. 6d. Get rule from clerk of rules; and an appointment from master to tax the costs; if not paid on demand, made by defendant's attorney on plaintiff himself, move for an attachment (on affidavit (a))

In C. B.

Get treasury rule of secondary, or brief to serjeant, with 10s. 6d. fee to move for rule, which is granted of course; an affidavit is not necessary in the first instance. Get appointment of prothonotary to tax costs, and serve the same with copy of rule on plaintiff's attorney. At the time of attending prothonotary, agreeable to appointment, carry an affidavit similar to that in the K. B. and proceed in the same after taxation of costs, to demand the same of plaintiff, and on refusal to make affidavit (a) thereof, and move for attachment for not paying costs, in pursuance of prothonotary's allocatur;

(a) Form of Affidavit.

Form of affidavit.

A. B. of, &c. and E. F. of, &c. severally make oath, and say, and first the deponent A. B. for himself saith, That on Monday last he did personally serve the above-named plaintiff with a true copy of the rule, and the master's (or prothonotary's) allocatur thereon, hereto annexed, and at the same time shewed him the said original rule, and allocatur thereon; and that he this deponent then demanded of him the costs allowed by the master (or prothonotary) on the said rule, but that the said plaintiff did not then, nor at any time since, pay the

of such demand and refusal) for not paying costs, agreeable to the master's allocatur. It is absolute in first instance, and when obtained, must be carried to the crown office, where attachment will be made out; your own officer will execute it; pay him one guinea.

tur; forjeant's fee 10s. 6d. The attachment is signed by the prothonotaries, and is made returnable on a day certain; the proceedings are by original.

The demand of costs to be paid must be at the same time the rule is served. *Britton v. Dickinson*, Bar. 120.

The rule may be drawn up payable to the defendant or his attorney; but if payable to both, and the money on demand is refused, the defendant and his attorney must join in the affidavit for an attachment.

How rule may be drawn up.

When the costs are taxed, a demand must be made by the defendant, if the rule is payable to him; if to either him or his attorney, either of them may make the demand; but, in such case, both should join in the affidavit, the one swearing to the demand and refusal, and the other negating the receipt of the money. Imp. C. B. 339.

By whom affidavit to be made.

The rule of court and master's allocatur should be affixed to affidavit, but a copy will do if sworn by the affidavit to be a true copy annexed.

The affidavit (a) for an attachment must be drawn with correctness.

It must state that the defendant was served personally with a rule, and that the original was shewn to him at the same time. *The King v. Smithies*, 3 D. & E. 351.

What it must state.

It must shew the day of service and demand precisely;—"on or about such a day," not sufficient. *Bretts* against *Wadham*, 2 Wil. 227.

But it may be amended if insufficient. Ib.

It may be amended.

Defendant moved, that plaintiff might go on to trial without first paying the costs of a former notice. The court at first seemed to think, that defendant ought to have applied by way of attachment for the plaintiff's not paying costs; but yet, as it appeared the plaintiff was already in custody, so that the attachment would be but of little service, the court made a rule to shew cause why he should not be hindered; which was afterwards made absolute. *Smith v. Lidgate*, 1 Barn. 44.

Where court will stay proceedings, and not compel defendant to sue out attachment.

the same to this deponent; and the same now remains unpaid to this deponent. And this deponent E. F. for himself, saith, That he hath not received the said costs, or any part thereof, but the same now remains due and unpaid to this deponent.

(2) See preceding note.

In

In general attachment for not paying costs agreeable to the master's allocatur is a rule absolute in the first instance; but if it be for the payment of any balance of money, as what is found by the master to be due on an annuity transaction, or the like, it is only a rule *nisi*.

SECTION III.

Of carrying down the Record by Proviso.

In what cases to be had.

It is in general true, that the defendant in any action is not entitled to a writ of *nisi prius* unless the plaintiff has made default in proceeding to trial; but in every action wherein the defendant is equally an actor with the plaintiff, as in replevin, prohibition, and *quare impedit*, the defendant may sue out a writ of *nisi prius* although plaintiff has not made such default.

Why so called.

And this is called carrying down the record to trial by proviso; because in the *venire facias* directed to the sheriff, there is a proviso to the following effect: "And have there the names of the jurors and this writ; *provided* always, that if two writs shall thereupon come to you, one of them only you return and execute," &c.

Of the statute 7 & 8 W.

By stat. 7 & 8 W. 3. c. 32. if any defendant be minded to bring the issue to trial, (when, by course in any of the said courts, he may lawfully do the same by *proviso*,) he may of the issuable term next preceding such intended trial to be had at the next assizes, sue out a new *venire facias* to the sheriff by *proviso*, and prosecute the same by writ of *habeas corpora*, or *distringas*, with a *nisi prius*, as though there had not been any former *venire* sued out or returned in that cause, and so *toties quoties* as the matter shall require.

Formerly usual remedy.

Formerly, therefore, trial by *proviso* was the only way defendant had to get rid of an action if plaintiff neglected carrying the record down to trial. And this was done by obtaining a rule upon such default made by plaintiff, for record to be made up by *proviso*.

Now superseded by stat. 14 G. 2.

But now the old mode of trial, except in certain cases, is superseded by the more summary mode of moving for judgment, as in case of a nonsuit: which remedy, in case plaintiff does not proceed to trial, according to the practice of the court, is given by stat. 14 Geo. 2. c. 17.

but only in certain cases.

I say it is superseded, *except in certain cases*, for the statute does not extend to all cases, but only to those wherein plaintiff has been guilty of a default in not proceeding to trial, and

and wherein defendant at common law was entitled to try by *proviso*, by reason of such *default*.

In all cases, therefore, where both parties are actors, and where defendant, in the first instance, is entitled to try by *proviso*, defendant must still resort to trial by *proviso*, and cannot have judgment as in case of a nonsuit; for in such, plaintiff is no more obliged to carry down the record than defendant; as in actions of replevin. *Jones v. Concannon*, 3 D. & E. 661.

When still necessary,

if both parties are actors;

So wherever the statute has been once complied with, though a subsequent default should be made by plaintiff, defendant must resort to his common-law remedy of trial by *proviso*.

if statute has been complied with,

Now the statute is complied with, by the plaintiff having once carried down the record to trial.

and record once carried down.

Whenever, therefore, this has been done, though the cause was not determined at the trial, and it may be necessary for the final decision to carry it down again, yet if plaintiff should neglect so to do the second time, defendant cannot have judgment as in case of a nonsuit, but must resort to the trial by *proviso*; as where plaintiff was nonsuited at the trial, but nonsuit was afterwards set aside, and plaintiff neglected to go to trial again. *The King v. Pippet*, 1 D. & E. 492.

So where the cause was made a *remanet* by defendant's consent. *Newburn v. Langley*, 3 D. & E. 1.

So where plaintiff obtained a verdict, but the verdict was afterwards set aside. *Porzelius v. Maddocks*, C. B. T. R. 101.

Trials by *proviso*, therefore, are still frequently necessary.

To carry down the record by *proviso*, a rule for that purpose must first be obtained—" *Fiat nisi prius per proviso si querens fecit defaultam*," which is given by the master at the back of the issue, and entered at clerk of rules. *Dodson v. Taylor*, Str. 1055.

Rule for trial by proviso.

But this rule need not be got before notice of trial is given; it is sufficient if defendant has it any time before the trial; for the only use of it is, that if two records are carried down to trial, the one by plaintiff and the other by defendant, the former only should be tried. *The King v. Pippet*, 1 D. & E. 696.

When it must be obtained.

Indeed, in criminal trials, where the defendant carries the record by *proviso*, no such rule is obtained at all. *Ibid*.

Notice in criminal cases;

And in the case in Str. 1055. above cited, though nonsuit was set aside in a civil cause for want of such rule, yet it was then said to be the old practice, but generally discontinued.

otherwise in civil.

tinued. In the case of *Proude and Willimot*, before that period, trial was set aside for want thereof. 1 Barn, 18.

What notice of trial necessary.

If defendant proceeds by *proviso*, he must give the same notice of trial in all cases as plaintiff would have been obliged to give, R. East. 1651. *Swale v. Leaver*, C. B. P. R. 388.; and if after notice he does not proceed to trial, nor countermand in due time, he is liable to pay plaintiff his costs. *The King v. Pippet*, 1 D. & E. 696.

If both parties give notice.

If defendant gives notice of trial by *proviso*, and plaintiff also gives notice, and neither of them proceed, both shall be entitled to their respective costs. *Reading v. Grafton*, P. R. 305.

Court, on motion, will suffer defendant to carry down record to try issue out of chancery.

There was an issue directed by the court of Chancery, which defendant was desirous of trying, but which (it was suggested) plaintiff wished to delay; and, on that ground,

Gibbs moved, that the defendant might be at liberty to carry the record down to trial at the next assizes; observing, that by the common law defendant could not carry it down by *proviso*.

The court thought the application reasonable, and granted the rule absolute in the first instance; saying, that the plaintiff would not be damaged by it, for that if he chose to take the record down himself, the costs of this application must be paid by defendant. *Humpage v. Rowley*, 4 D. & E. 767.

SECTION IV.

Of putting off the Trial.

Trial, when it may be put off.

"There is no crime so great," said Lord Mansfield (Blac. 514.), "nor proceedings so instantaneous, but that upon sufficient grounds the trial may be put off." But of this sufficiency the court will be first well satisfied. The most usual ground is the absence of a material witness, and even in this instance it is only allowed under particular restrictions.

Usual ground, absence of witness.

Of the affidavit in such case.

There must be an affidavit of the fact; and thereby it must appear, 1st, That the witness is really a material one for the defendant in the cause; 2d, That the party who applies has not been guilty of any neglect in procuring him; and, 3dly, That there is a reasonable expectation of his returning by the time to which the trial is prayed to be put off.

1st, The

1st, The mere swearing that the witness is a material witness, as deponent believes, without any thing further, was held insufficient. *Gray v. Halton*, Bar. 437. And even where the affidavit was, "That A.B. and C.D. are material witnesses for defendant in this cause, without whose evidence defendant cannot safely proceed to trial, as defendant is advised and verily believes," was held bad; because the belief seemed to go through the whole, as well to A.B. and C.D. being material witnesses as to the other necessary part of the affidavit, that the party cannot safely make defence without their testimony; the former part, respecting A.B. and C.D. being material witnesses, ought to be positively sworn; belief as to it is not sufficient, but as to the latter part it is. *Day v. Samson*, Bar. 448.

The usual way, however, now of making this part of the affidavit is, "That A.B. of, &c. is a material witness for him this deponent in the said cause, as he is advised, and believes to be true, and that he cannot safely proceed to the trial thereof without the testimony of him the said A.B." See form of affidavit, *post*, this Section.

2d, Party applying must have been guilty of no laches.

Where it appeared that the witness who was sworn to be a material witness went out of town or abroad, after the notice of trial was given, the court would not put off the trial for it, as the defendant might have subpoena'd him in time. *Bourne v. Church*, Bar. 442.

So court refused where it appeared that the defendant had conducted himself unfairly and been the cause of improper delay. *Saunders v. Pitman*, 1 P. & B. 33.

3d, There must appear reasonable expectation of witness's returning in time.

Where the witnesses are foreigners, special ground ought to be shewn of the probability of their return, as the presumption is, that they will not come back. So if they are in the army, and cannot come without special permission; or, in general, if they are gone to reside abroad, or the like, special reasons should be assigned why they are likely to return. *Rex v. D'Eon*, Blac. 515.

For the above cases differ from the ordinary cases of English witnesses being accidentally gone abroad, or gone for a small time only, and expected to return to their own country, their natural home and residence. *N. Burr*. 1516.

And even in those cases, if the witness is likely to stay any time, as where one was gone to the East Indies for eighteen months, court will not grant rule *nisi* on common

1st, It must be sworn witness is material.

2d, Party must have been guilty of no laches.

3d, There must be reasonable expectation of his return. If a foreigner.

If gone abroad for length of time.

ed from it. It
should be
admitted.

If any suspicion
in the case.

affidavit, but defendant must make a special case, stating the nature of the demand, and what it is the witness can prove; which, if the court do not think sufficient, they will not put off the trial. *Lord v. Cooke*, Blac. 436.

If the usual form of affidavit is observed, and there is no special ground of suspicion, the rule goes of course; but if there be such ground, it is refused, unless the party will go into further and minuter circumstances; or if it appear that there is an affected delay, the rule is also then refused. *Rex v. D'Eon*, Blac. 514.

For men take such latitude to swear in the common form, that where a suspicion arises from the nature of the question, or from contrary affidavits, the court will examine into the ground upon which the delay is asked, and this both in criminal and civil cases. *Ib.* Burr. 1514.

Who may make
affidavit.

It was formerly held, that defendant himself must, and that no third person could make the affidavit. *Easter v. Upington*, Bar. 437.

But this strictness was afterwards dispensed with, as there were many cases where a third person could swear a witness to be a material one, and defendant himself could not; as where a factor sells goods for his principal, and employs a porter to deliver them, the factor knows the porter to be a material witness, but the principal does not. *Day v. Sampson*, Bar. 448.

When motion
to be made.

But generally speaking defendant must make affidavit.

The motion for putting off the trial ought to be made two days at least before the day of trial. *Bourne v. Church*, Bar. 442. *Sellon v. Chamberlayne*, Bar. 444. *Roberts v. Kilborough*, Bar. 438.

Exception to
rule.

But when it appeared the fact of the witness being material, did not come to defendant's knowledge time enough to move two days before the last day appointed for trial, it was put off, though cause was called on and made a *remanet* by consent. *Hart v. Whitlock*, Bar. 452.

To what time
trial generally
put off.

The usual practice is for the trial to be put off till the next term, and not for a longer period; when plaintiff must apply again, if he finds it necessary. *Stratford v. Marshall*, Bar. 440.

In the above case, indeed, it was put off for a longer time, on affidavit that defendant would not return before; but there is a note saying, that the common practice was otherwise.

Affidavits read,
though not
taken before
commissioner.

On motion to put off a trial, the court suffered affidavits to be read taken before a vice-consul abroad. Such affidavits are constantly received and read at the council board; not

Sec. IV.] OF PUTTING OFF THE TRIAL.

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is it reasonable to expect that such sort of affidavits should be taken before commissioners. *Corish v. Kennedy*, Bar. 466.

But in other cases, if justice requires it, the court will put off the trial.

Trial was put off because the attorney for defendant was so ill as not to be able to attend. *Hayley v. Grant*, Say. 63.

Trial put off because attorney was ill.

In K. B. it does not seem absolutely necessary to give notice of the intended motion, as it is merely a rule to shew cause, but it is the best way to do so. In C. B. notice and affidavit of service is necessary.

How to proceed in obtaining rule to put off trial.

Notice may be to the following effect :

In *A. B. defendant, against C. D. plaintiff.*

Take notice, that this honourable court will be moved on *next*, or to-morrow, as the case may be, or so soon after as counsel can be heard, that the trial of this cause may be put off until next term, on account of the absence of a material witness on behalf of defendant. Yours, &c.

Form of notice of motion.

Then prepare affidavit (which should be made by defendant, unless abroad or under special circumstances) as follows :

In the *A. B. plaintiff, and R. D. defendant.*

T. S. of, &c. the defendant in this cause, maketh oath, and saith, that issue was joined in this cause this present Hilary term, and that notice of trial was given for the last sittings within the said term: And this deponent further saith, that R. W. late of, &c. is a material witness for him this deponent in the said cause, as he is advised, and believes to be true; and that he cannot safely proceed to the trial thereof without the testimony of him the said R. W.: And this deponent further saith, that he hath endeavoured to find the said R. W.; that he hath been to the house of the said R. W. and was informed that he was gone to Norwich in the county of Norfolk, and that he this deponent hath sent there for the purpose of subpoenaing him; but that the said R. W. is gone from thence, as this deponent hath heard, and verily believes to be true; and that he this deponent cannot get any information where the said R. W. is, but is informed, that he will be at home in two months; and that he this deponent expects to be able to procure the presence of the said R. W. within the first sittings of next Easter term.

Form of affidavit.

Having obtained rule nisi, serve copy on plaintiff's attorney, shewing the original rule; and if no cause shewn, make rule absolute in usual way, on affidavit of such service.

SECTION V.

Of making up the Record, suing out Jury Process, entering Cause for Trial, and of Remanets.

(A) Of making up the Record for Trial, and passing same.

(B) Of suing out Jury Process, *Venire, Distringas, Habeas Corpora Juratorum, &c.*

(C) Of entering Cause for Trial.

(D) Of the Cause being made a *Remanet*.

(A) (A) Of making up the Record for Trial, and passing same.

Of making up record for trial.

The *nisi prius* roll, or record, contains all the pleadings *verbatim*, awards of jury process, and other things in the course of the cause, engrossed on parchment, with a double half-crown stamp; it is now made up by the attorney, though formerly by the clerks in court.

The *nisi prius* record is made up in the following manner:

In B. R.

In C. B.

How *nisi prius* record made up.

(When by bill.)

(When against indifferent persons not privileged,) *prothonotaries' names.*

If a country cause.

(a) Pleas before our Lord the King at Westminster, of Michaelmas term (the term in which issue is joined) in the 37th year of the reign of our Sovereign Lord George the Third, by the grace of God, &c. and in the year of our Lord 1797.

Pleas at Westminster before Sir James Eyre knight, and his companions, justices of our Lord the King of the Bench, of Hilary term in the 37th year of the reign of our Sovereign Lord George the Third, by the grace, &c.

The number of the roll got, at time of entering issue; for which see ante, Sec. 2. (D) of this Chapter.

Roll 410. Mansfield & Way. Buckinghamshire, to wit. Be it remembered, &c. (copy the memorandum and the whole issue from the issue or paper book *verbatim* to the end of the award of the venire, and day given, &c. then enter another placita in this manner):

Roll 350. Buckinghamshire, C. L. late of &c. gentleman, was attached to answer R. R. of a plea, &c. and whereupon the said R. complaineth, that whereas, &c. (to the end of the issue and award of venire).

For the reason why in B. R. there is a second

Pleas before our Lord the King at Westminster, of the term of Saint

In this court the placita is written but once, at the beginning, unless

(a) These are called the *placita*, and in every record to be made up there must be two, the one preceding the issue which is to be of that term in which the issue is joined, the other of the term the cause is to be tried; but if the cause is to be tried of the same term in which issue is joined, then the two placitas are to be of that term.

* For mitter court o day of f Could I day of f our Sov France,

Saint Hilary (the term the cause is to be tried) in the 37th year of the reign of our Sovereign Lord George the Third, by the grace, &c. and in the year of our Lord 1797.

Buckinghamshire, to wit. The jury between A. B. by his attorney, plaintiff, and C. D. defendant, of a plea of trespass on the case, (or as the cause of action may be,) is respited before our Lord the King at Westminster, until (a)

unless his Majesty's justices assigned to hold the assizes in the county aforesaid, shall first come on

(the day of assizes) at (the place where holden)

in the said county, according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors to make the said jury between the parties aforesaid at the same place: And be it known, that the writ of our said Lord the King in this case upon record, was delivered to the under-sheriff of the county aforesaid, the day of (the last day of the term the last placita was of) in this same term, before our Lord the King at Westminster, to be executed according to law at his peril.

If the cause is a town cause, to be tried either at Westminster Hall or Guildhall, record is same *mutatis mutandis*, only jurata will be as follows:

In B. R.

Middlesex, to wit. The jury between A. B. plaintiff and C. D. defendant,

In C. B.

Middlesex, to wit. The jury between R. R. plaintiff, and C. L. late

* Form of placita on the removal of the chief justice in term: Pleas at Westminster before Sir James Eyre knight, and his brethren, justices of his Majesty's court of Common Bench, in fifteen days of Easter, in three weeks from the day of Easter, and in one month from the day of Easter; and before Sir Henry Gould knight, and ——— Heath knight, justices of the said court, from the day of Easter, in five weeks in Easter term in the 37th year of the reign of our Sovereign Lord George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c.

E c 4

left on a change or death of the chief justice, or an old record, in which case a second placita is written of the term in which the cause is to be tried; therefore a space for such placita should be left.*

placita, and not in C. B. See Appendix N.

to wit. The jury between R. R. plaintiff and C. L. late of &c. gentleman, in a plea of (as the case may be), is respited here until (a) unless our

Lord the King's justices assigned to take the assizes in the county aforesaid, by form of the statute in such case made and provided, shall come before, on (the day of the assizes) at (the place where to be holden) in the county aforesaid, for default of the jurors, because none came; therefore let the sheriff have the bodies of the several persons mentioned in the panel annexed to the writ of habeas corpora juratorum: And be it known, that the justices here in this same court in this term, delivered a writ thereupon to the deputy of the sheriff of the county aforesaid, to be executed in due form of law, &c.

(a) The return of the distringas in B. R. and habeas corpora juratorum in C. B. and which should be the next return after day of trial.

How nisi prius record made up, if a town cause.

defendant, in a plea of is respited before our Lord the King at Westminster until, &c. (the return of distringas,) unless the right honourable Lloyd Lord Kenyon, his Majesty's chief justice assigned to hold pleas before the King himself, shall first come, on (the day of the sittings), at Westminster Hall in the said county, according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear.

In a town cause, the sciendum at the end of the jurata is omitted in B. R.

late of , &c. gentleman, in a plea of , are respited before until in fifteen days of the day of Easter. (return of hab. corp. jur.) unless Sir James Eyre, the King's chief justice of the bench here assigned by form of the statute in such case, shall come before, on Tuesday the day of (the day of the sittings), at Westminster in the great Hall of Pleas there, commonly called Westminster Hall, in the said county of Middlesex, for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the several persons mentioned in the panel annexed to the writ of habeas corpora juratorum: And be it known, that the justices here in this same court in this term, delivered a writ thereupon to the deputy of the sheriff of the county aforesaid, to be executed, &c.

If the trial is in London instead of Westminster Hall, say, the Guildhall of the city of London aforesaid, &c.

When the suit is in B. R. by original there is no memorandum at the beginning, as when by bill (for the reason of which, see ante, p. 389); so that the record in such case is similar to the common way in the court of Common Pleas; and when the suit in C. B. is by bill, as against officers, privileged persons, &c. the record is then made up like the records in the King's Bench, (when by bill,) beginning with a memorandum.

How nisi prius record made up when proceedings by original in B. R. or by bill in C. B.

(A. 1)

Of passing the record.

(A. 1) Of passing the Record.

In B. R.

When the record is engrossed, you make an incipitur of the issue on a King's Bench roll, by entering thereon the term issue is joined with warrants of attorney for plaintiff and defendant, and part of memorandum of issue: this is done in pursuance of R. Mich. 5 Ann. then take the record roll and the draft of the issue to the clerk of the judgments in the King's Bench office, who will enter the issue and mark the roll record and issue paper;

10

In C. B.

When the nisi prius record is prepared, it must be carried with warrants of attorney to clerk, who will mark it, then to the probnotaries' office, who will sign record, for which pay 1s. and 2s. a count for entering issue, or 8d. per sheet if special, and no entries paid for; the clerk will give you a roll to enter pleadings thereon to be done at a future period; then go to the clerk of the treasury at the chief justice's chambers, who will

will

to whom is paid for entering the issue, if it does not exceed ten sheets, 3s. 6d. and for every six more 1s.

If the issue should be of an old term, and entries not paid for, get number-roll of Mr. Edge, term issue is joined, make out docket for entry, and docket same with the clerk of the judgments.

The record being ready to be sealed, it must be carried to the nisi prius office, where it is examined, sealed, and passed; for which is paid 7s. 6d. for the first eight sheets, and 7s. for every eight sheets after, and 6d. to the sealer; and on a country cause, if above three weeks from the end of term, 2s. for judge's warrant.

If at the assizes, the issue is entered the same as before, and record is passed at the same office with the clerk of the circuit in which the cause is to be tried; get the venire returned in town with the undersheriff, and then send it down and enter it for trial as directed post (C).

No record of nisi prius for trial of any issue at the assizes shall be sealed after the end of three weeks after the issuable terms. Trin. 31 Car. 2.

But now by a judge's order, for which you pay 2s. the record may be sealed at any time before the assizes.

All the pleadings in the cause must be regularly entered on nisi prius record, the same as in issue or paper book; so that if there has been judgment of *respondeas ouster* in a plea of abatement, and defendant pleaded over, or if proceedings on a demurrer, they must be all set forth; for which see *ante*, Sect. 1. of this Chapter. *Ld. Raym.* 329.

If there are several defendants, and they sever in plea, plaintiff may, if he please, enter a *nol. prof.* as one defendant, at any time before the record is sent down to be tried. *Greaves v. Rolls*, *Sal.* 457.

So if one plead bankruptcy, and the other a different plea, plaintiff may enter *nol. prof.* as to the bankrupt, and proceed to final judgment against the other. *Nokes and another v. Ingham*, 1 *Wil.* 89.

will examine and see that the jurata is rightly entered, and seal the record; pay at sittings 1s. at assizes 6s.; also 2s. for first three sheets, and 4d. every other sheet, and 2s. 2d. for seal, and 2s. for a judge's warrant, if it be three weeks after term.

The clerk of the treasury, by Reg. Hil. 2 & 3 Ja. 2. shall not sign or seal any record of nisi prius unless the same shall be first signed or stamped by the clerk of the warrants; and the record is not to be signed before the issue is entered. Mich. 1654.

Records of nisi prius for trials at the assizes shall be signed by the respective prothonotaries, and signed and sealed by the clerk of the treasury, within three weeks after the end of the issuable terms. Trin. 29 Car. 2.

All pleadings must be entered on record.

If several defendants, and they sever, a *nol. prof.* may be entered;

so if one plead bankruptcy.

If

If one die, it must be suggested on record.

If one of the defendants die after issue joined and before trial, it must be suggested on the roll by 8 & 9 W. 3. c. 11. f. 7. But if properly suggested on the plea roll, though not so accurately set forth on *nisi prius* record, it is enough. See *Far v. Denn*, Burr. 363.

How if there be a variance between issue and *nisi prius* record.

If there be a variance between the issue book delivered in paper, and the record of *nisi prius*, it ought to be mentioned or objected to at the trial; for if the cause be tried, the court on that account will not set aside the verdict: and if the record of *nisi prius* had been wrong, the court would have amended it by the roll, after a verdict and defence made. *Leeman v. Allen*, 2 Will. 160.

If the record of *nisi prius* agrees with the declaration delivered, a variation from the issue is not material. *Shepley v. Marsh*, Str. 1131. and 2 Wil. 160.

Though but a few years before it seems to have been held otherwise.

No defence was made at trial because of a variance (in issue delivered on a promissory note, the name of the indorser was omitted, though inserted on the record of *nisi prius*). Rule absolute to set aside the verdict. *Wreathock v. Bingham*, Bar. 476.

The *similiter* was left out in the issue delivered, though inserted in the record of *nisi prius* verdict without defence; and on a rule to set aside for the variance, the court were of opinion, that no statute of jeofails extends to it, it is a material variance, and defendant relied on it. Rule to set it aside absolute. *Rye v. Crossman*, Bar. 476. So where it was left out in record of *nisi prius*. *Cooper v. Spencer*, Str. 641.

(B)

(B) Of suing out Jury Process, *Venire*, &c.

Of suing out jury process. Intention thereof.

The intent of the *venire* and jury process is to procure a jury to try the matter in issue between the parties. The writs are directed to the sheriff, commanding him to cause a jury to come at the time and place therein mentioned. Formerly, indeed, the jury were obliged to be collected from the very hundred or neighbourhood where the cause of action arose *de vicineto*, as it is called.

Whence a jury formerly came;

how altered by statute.

But, by the statute 4 & 5 Ann. c. 16. the *venire* is to be awarded of the body of the proper county where the issue is triable in civil actions (excepting upon penal statutes); and by 24 G. 2. c. 18. it is extended to actions and informations on penal statutes also.

So

So that now the jury may come from any part of the county where the cause is to be tried.

By R. E. 1651. Sheriffs are ordered upon the return of every *venire facias* to cause sufficient summons to be given unto all jurymen that are by them returned upon any juries for the preventing of tales.

By 7 W. 3. sheriffs are to summon jurors six days before they are required to serve, or liable to forfeit 10*l.* by 4 & 5 W. & M. c. 24.

The 7 W. 3. and 3 G. 2. c. 25. direct how constables are to make returns of lists of persons liable to serve on juries.

When the record is engrossed, proceed as follows :

In B. R.

The plaintiff's attorney must make out writs of venire facias and distringas, which are on a 2s. 6d. stamp each, and may be had at any law stationer's ready printed, price 2s. 8d. These writs are not to be signed. Pay sealing at seal office, 7d. each.

If the cause be tried in London or Middlesex, venire is to be tested the first return of term in which cause is to be tried, and returned some return-day before trial; the distringas must be tested on the return-day of the venire, and returnable the next return-day after trial. If at assizes, venire must be tested the first return-day preceding the assizes, and returnable the last day of that term; the distringas must be tested on the return-day of venire, and returnable the first return of the next term after the assizes.

*If in London or Middlesex, the venire is taken out by plaintiff's attorney in order to be allowed him in costs, but never used or sealed. In London, carry distringas to one of the compters; pay sheriff for returning it 4s. 4d. if common; 4s. 8d. if special. In Middlesex, carry same to the sheriff's office in Took's court; pay there returning 1*l.* 4s. 8d. If in a country cause, venire is returned by*

In C. B.

*The plaintiff's attorney must make out writs of venire facias and habeas corpora, which are on a 2s. 6d. stamp each, and may be had at any law stationer's, price 2s. 8d. The venire is signed by prothonotary; pay him 1s. 4d. The habeas corpora is signed by the clerk of the habeas corporas; pay, when in London or Middlesex, 2s.; if at the assizes, 1*l.* 9d. No præcipe is made for the office on these writs.*

*If cause not tried at time mentioned in habeas corpora, you make out a new writ. If you carry the old writ to the officer you save 1*l.* 1d. Pay sealing at seal office, 7d. each.*

If cause to be tried in London or Middlesex in term, venire is to be tested the first return of term in which cause is to be tried, and returned some return-day before trial; the habeas corpora must be tested on the return-day of the venire, and returnable the next return-day after trial. If after term, teste of venire may be first day of term, and returnable last general return-day; and teste of habeas corpora on quarto die post of return-day of venire, and returnable first general return after cause tried. If at assizes, venire must be tested the first return-day of the term preceding the assizes, and returnable the

How to proceed in suing out jury process in both courts.

How the writs are to be tested, &c.

the

by sheriff's deputy in town, and the distringas by the under-sheriff in the country.

the last day of that term; the habeas corpora must be tested on the return-day of venire, and returnable the first return of the next term after the assizes.

If in London or Middlesex, the venire is taken out by plaintiff's attorney in order to be allowed him in costs; but never signed, sealed, or used. In London, carry habeas corpora to one of the compters; pay sheriff for returning it 4s. 6d. In Middlesex, carry same to the sheriff's office in Took's court; pay there returning 12s. If in a country cause, venire is returned by sheriff's deputy in town, and the distringas by the under-sheriff in the country.

The forms of the several writs are as follow :

In B. R.

Form of venire.

George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. to the sheriff of Middlesex, greeting : We command you, that you cause to come before us at Westminster, on next after

(some return-day before the day of trial, if a country cause, the last day of the term) twelve free and lawful men of the body of your county, each of whom has ten pounds} by the year of lands, tenements, or rents, at the least, by whom the truth of the matter may be the better known, and who are nowise of kin either to A. B. the plaintiff, or to C. D. the defendant, (the parties must be described as in the pleadings,) to make a certain jury of the county between the parties aforesaid, of a plea of trespass on the case, (or whatever the action is,) because as well the said C. D. as the said A. B. between whom the matter in variance is, have put themselves upon that jury; and have there shewn the names of the jurors, and this

In C. B.

George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. to the sheriff of Essex, greeting : We command you, that you cause to come before our justices at Westminster, on the Morrow of the Purification of the Blessed Virgin Mary, twelve free and lawful men of the body of your county, each of whom has ten pounds of lands, tenements, or rents by the year, at least, by whom the truth of the matter may be better known, and who are in nowise of kin either to A. B. the plaintiff, or to C. D. late of, &c. or to E. F. late of, &c. (if the defendant be declared against with an alias diſſa, or as an executor or administrator, he must be here described, as in the pleadings,) to make a certain jury of the county between the parties aforesaid, in a plea of (as the case may be), because as well the said C. D. and E. F. (the party who first takes the issue) as the said A. B. between whom the matter in variance

this writ. *Witness, Lloyd Lord Kenyon, at Westminster, the first day of the term) in the 37th year of our reign.*

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riance is, have put themselves upon the jury; and have there the names of the jurors, and this writ. Witness, Sir James Eyre knight, at Westminster, the 23d day of January in the 37th year of our reign.

(Prothonotary's Name.)

If there are two sheriffs, and one is a party or interested, by being related to either of the parties, or the like, *venire* should be awarded to the other only; or if both are interested, or there be only one sheriff, then to the coroner of the county; and if both sheriff and coroner are interested, then the *venire* should be awarded to elisors, two persons chosen by the master in K. B. or prothonotary in C. B. (upon motion in court) for that purpose. *Holland v. Heron, Bar. 465.*

How if sheriff be interested.

But in these cases there is a special suggestion and award of the *venire* on the issue, so that it is only following the same in making up the record. *Vide, Of the Issue, Sect. 1. of this Chapter.*

If it be a Welch issue, and award of *venire* into next English county, the *jurata, venire, and distringas* are the same as in common cases.

How if Welch issue.

If the defendant carries down the cause by proviso, the writ runs thus: "And have here the names of the jurors, and this writ;" provided always, that if two writs shall thereupon come to you, that you only return one of them to our said court before us, if in B. R. or to our said justices at Westminster, if in C. B. at the time aforesaid.

How if record carried down by proviso.

In B. R.

The form of a *distringas* *juratores* is as follows:

George the Third, &c. to the sheriff of Middlesex, greeting: We command you, that you distrain (a) the bodies of the several persons named in the panel hereunto annexed, jurors summoned in our court before us, between A. B. plaintiff, and C. D. defendant, by all their lands and chattels in your bailiwick, so that neither they, nor any one of them, do intermeddle therewith, until you shall have other command in that behalf; and that you answer to us for the issues of the same, so that you

In C. B.

The form of a *habeas corpora* *juratorium* is thus:

George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. to the sheriff of M. greeting: We command you, that you have before our justices at Westminster, from the day of Easter in fifteen days, (the next return after the trial,) or before the right honourable Sir James Eyre knight, our chief justice assigned to hold pleas in our court of the Bench, by force of the statute in that case provided, if he shall come before, on

Form of *distringas* in B. R. and *habeas corpora* *juratorium* in C. B. If cause at Westminster.

(a) If it is a special jury, here say, A. B. of, &c. C. D. &c. (and so on, going through the master's or prothonotary's list exactly,) merchants, jurors summoned &c.

the

you have their bodies before us at Westminster, on (the first return-day after the trial); or before our right trusty and well-beloved Lloyd Lord Kenyon, our chief justice, assigned to hold pleas in our court before us, if he shall first come, on the day of (the day of trial), at Westminster Hall in the county of Middlesex aforesaid, according to the form of the statute in such case made and provided, to make a certain jury between the said parties, of a plea of trespass on the case, and to hear their judgments of many defaults; and have you there the names of the jurors, and this writ. Witness, Lloyd Lord Kenyon, at Westminster, the day of (the return-day of the venire) in the 37th year of our reign.

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If in London;

or at assizes.

If action by original in B. R.

How on traverse of inquisition out of Chancery.

Distingas amendable;

so habeas corpora juratorum;

so jurata in record of nisi prius amendable.

If in London, the *distingas* or *habeas corpora* run thus: "At the Guildhall of the city of London aforesaid." If at the assizes, thus: "Or before our justices assigned to hold the assizes in your county, if they shall first come on (the commission-day), at (place where assizes held) in your county, according," &c.

If the action is by original in B. R. you make the *venire* and *distingas* returnable *ubicunq.* or "wheresoever we shall then be in England;" put in the defendant's addition, and leave out the word "then," at the conclusion of the writ.

Upon the traverse of an inquisition sent out of Chancery to be tried in B. R. the *venire facias* must be made returnable on a general return-day, not on a day certain. *Rex v. Roberts*, 1 Wil. 77.

The *distingas* is amendable; the *distingas* in debt was *de placito*, with a blank, and after verdict held amendable, *Ld. Raym.* 1143. the *venire facias* being right.

Motion to amend the writ of *habeas corpora juratorum*, after the trial, returnable on Wednesday next after eight days of the Purification, instead of Wednesday in fifteen days of Easter; and on shewing cause, the rule was made absolute for the amendment. *Waldo v. Harrison*, Bar. 5.

The writ of *habeas corpora juratorum* being wrong, in the day of *nisi prius* had been ordered to be amended; and afterwards

(Prothonotary's name.)

wards it was moved to amend the *jurata* in the record of *nisi prius*. The court were of opinion, that as the writ was amendable by the statute 5 Geo. and was amended, and the day of *nisi prius* thereby rightly appointed, the *jurata*, which is not an award of the court, but only to annex the proceedings, and is wrong by misprision of the clerk, ought to be amended and made agreeable to the writ; and the amendment was ordered. *Ib.*

The cause was at issue, and the record of *nisi prius*, *habeas corpora*, and *jurata* were all made up for trial at a certain sitting; but the cause not coming on to be tried at that day, the plaintiff's attorney ought to have altered the record of *nisi prius* writ and *jurata* for a future day of sitting, but neglected so to do, or to reseal the same, although he was apprised thereof; so the cause was tried at a future day, and it appeared, upon the face of the *jurata*, &c. that the cause was tried after the day of *nisi prius* mentioned therein, and there was a verdict for the plaintiff; and now plaintiff moved to amend the *habeas corpora* and the *jurata*, and the defendant moved to set aside the verdict. But, on shewing cause, the whole court were clearly of opinion, that the trial was *coram non judice*, and discharged the rule for an amendment, but were of opinion, that they ought *ex officio* to order a *venire de novo* to be awarded; which was ordered accordingly. *Crowder v. Rooke*, 2 Wil. 144.

If a fair and impartial trial cannot be had in the county where *venue* is laid, court may be moved not to change the *venue*, but to award the *venire* into another county; which is done by the party entering a suggestion on the roll, wherein should be suggested, upon the record, the facts, proving that such impartial trial could not be had otherwise. *Rex v. Harris*, Burr. 1332.

It is usual also, in such cases, to change the *venue*. See *tit. Venue*.

(B. 1) Of Jury Process in Counties Palatine.

When a cause of action arises in a county palatine, and the *venue* is laid there, the trial must be had by a jury of the palatinate; but as the king's writ does not run there, the record is sent by a writ of *mittimus* to the justices of the county palatine, commanding them to cause a jury to be summoned to try the issue between the parties, and to return the same, when tried, to the courts at Westminster, for the parties to hear judgment thereon.

In this case there is always a special suggestion on the *Tue*, and special award of the *mittimus* (See *ante*, Sect. 1: of this

At what time they ought to be amended:

too late after verdict;

but a *venire de novo* will be awarded.

In some cases, though *venue* not changed, *venire* will be ordered to be awarded into another county.

(B. 1)

Of jury process in county palatine.

Record sent by *mittimus*.

Suggestion for that purpose.

Form of mittimus to a county palatine.

The venire and habeas corpora are made out there.

This writ is signed with Messrs. Provost and Webb, and sealed.

Signing 2s. 8d. seal 7d.

What actions to be tried in county palatine, and to what regulations subject.

How far cause of action must arise there.

this Chapter); the mittimus itself, which is the only writ sued out here, is now sent, (the record being passed in same manner as other records are,) and is in the following form:

George the Third, &c. to our justices of our county palatine of Chester, greeting: The tenor of a certain record before us at Westminster, between A. B. plaintiff, and C. D. defendant, in a plea of trespass on the case, we send you inclosed herein, commanding that you, (having inspected the same,) by our writ of our said county, do command the sheriff of the same county, that he cause twelve free and lawful men of the body of the county, to come before you at your next session after this writ shall be delivered to you, each of whom having 10l. a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and inquired into, and who are in no wise related either to the said A. or to the aforesaid C. to recognize and make a jury of the county between the said parties in the plea aforesaid, because as well the said A. as the said C. between whom the said controversy is, have put themselves upon that jury; and also that you make such further process against the said jurors so to be impanelled, between the said parties as are in this behalf used and commonly made, according to the law and custom of the said county, until the issue aforesaid between the said parties shall be fully tried; and when the verification and issue aforesaid shall be there made and tried before you, then do you send the record of the said plaint, together with every thing that shall then and there be done before you therein, and also this writ before us at Westminster at a certain day which you shall appoint to the said parties to be there to hear judgment thereupon. Witness Lloyd Lord Kenyon, &c. Mansfield & Way.

Although all local actions arising in a county palatine must be tried there, yet such trial is subject to the same exceptions and regulations as in other counties; as if an impartial trial cannot be had, the venire may go to the next English county, where the King's writ run. Vide *King v. Amery*, 1 D. & E. 366.

It is observable, that there is no instance, except that of the *King and Johnson*, where the court has ever sent a record by mittimus to be tried in a county palatine where the fact did not arise there; and Mr. Just. Buller said in the above case, he very much doubted the power of the court to do it.

It is not quite clear when the doctrine of sending records by mittimus into county palatine was first taken up, but in 11 W. 3. (12 Mod. 313.) the court expressly said, that they could not order a trial in the county palatine of Lancaster, and therefore they sent the record to be tried in Yorkshire, as being the next county.

Wherever the cause of action arises in Wales, and the venue laid in any county there, it has been before observed, that the venire is awarded into the next English county. See Sec. 1. of this Chapter.

As to the meaning of the expression of the next English county, it is sufficiently explained in Plow. 200. where the reason given for directing the *venue* to the sheriff of Hereford was, because the town of Cardiff was in the county of Glamorgan in Wales, *where a sheriff of this kingdom of England cannot intermeddle*. From this reason it is manifest, that it must be the next English county where the king's writ of *venire* runs. That is the only way of accounting for the Welch causes having always been tried in the next English county where the *venire* runs, and not in Chester, though, in fact, that is nearer to Wales. *Per Buller J. in the case of The King v. Amery, 1 D. & E. 368.*

(C) Of entering Cause for Trial.

(C)

If the cause is to be tried in London or Middlesex,

Of entering causes for trial;

*In B. R.**In C. B.*

It must be entered in the marshal's book at Lord Kenyon's chambers in Serjeants-Inn, Chancery-lane; pay 11s. 8d.; at which time the record, with the distringas and pannel annexed, must be left with marshal.

It must be set down with the chief justice's marshal; pay 13s. 9d. leave the record and bab. cor. jur. with pannel annexed with him.

in London or Middlesex;

If to be tried at the sittings in term, it must be entered

At sittings in term;

Two days exclusive before the day of such sitting.

Two days inclusive of the day on which it is entered before such sitting.

If to be tried at the sittings after term, it must be entered, and the record delivered to the marshal.

at sittings after term.

If in Middlesex, the first day of the sitting after term.

Whether in Middlesex or London, two days at least before the adjournment-day. Hil. 32 G. 3.

If in London, two days before the adjournment-day in London. Id.

If the causes be not entered in proper time, defendant may enter a *ne recipiatur*, or marshal may refuse to receive them.

Of the *ne recipiatur*.

A *ne recipiatur* may be entered in C. B. after eight o'clock in the evening of the second day preceding the adjournment-day. Hil. 32 G. 3.

And if it be a special jury cause, the rule for a special jury must be drawn up, and the cause marked as a special jury in the marshal's book of causes before the adjournment-day after each term. R. Trin. 30 Geo. 3.

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If plaintiff be hindered from trying his cause by the defendant's entering a *recipiatur*, the plaintiff may try it at the next sitting, if in London or Middlesex, upon giving notice to the defendant or his attorney, on the day of the sitting on which it should have been tried, before the rising of the court. R. Mich. 4 Ann.

A *ne recipiatur* shall be allowed to be entered for the sittings at *nisi prius* after every term, unless the records of *nisi prius* and the writs be made up and brought into court on or before the sittings respectively. Hil. 8 Geo. 1. C. B.

Every cause to be tried at *nisi prius* in London and Middlesex, shall be tried in the order in which it was entered, beginning with *remanets*; unless it shall be made out to the satisfaction of the judge in open court, that there is reasonable cause to the contrary; who, thereupon, will make out such order for the trial of the cause so put off as to him shall seem just; notice to be given by the clerk of *nisi prius*. Mich. 17 Geo. 2. B. R. The same in C. B. Hil. 14 Geo. 2.

If to be tried at
assizes.

If the cause is to be tried at the assizes,

In B. R.

After having passed the record as before, and having got the venire returned in town with the under-sheriff, send distringas and venire into the country with the record, carry the writ and record to the judge's marshal at the judge's lodgings at the assize town, and there enter them together, pay 4s. 8d.

In C. B.

Having passed the record, as in the other cases, and got venire returned, send it with the record into the country, the sheriff will return the habeas corpora juratorum in the country, take them all to judge's marshal at assize town, and have them entered.

In every cause to be tried at the assizes the writ and record shall be entered together, and no record shall be received without the writ. T. 10 & 11 Geo. 2.

All country causes must be entered before the sitting of the court, on the day after the commission-day, except in Norfolk and Yorkshire; in which counties they may be entered any time before the sitting of the court on the second day after the commission-day. R. H. 14 Geo. 2.

But by R. H. 32 Geo. 3. in Norfolk and Norwich such writs and records must be delivered to and entered with the marshal before the first sitting of the court on the day next after the commission-day.

A list of the causes when entered shall be made by the marshal and fixed up in some public place in the *nisi prius* court, there to remain during the whole time of the assizes. R. H. 14 G. 2.

(D) Of

(D) Of the Cause being made a *Remanet*.

(D)

How, if the cause be made a *remanet* in town.*In B. R.*

If the cause is not tried the day of the sitting, it is then made a *remanet* by the marshal, of course he alters the jurata, pay him 5s. get the *disfringas*, alter the return to the day of the next sitting, (if it be a proper return-day,) if not, the next day; re-seal it, pay 1s. annex it to the record again, as there is no occasion for the sheriff to return a new pannel, nor is there occasion for a new stamp.

In C. B.

If the cause is not tried the day of the sitting, you must apply to the marshal to get it made a *remanet*, pay him 4s.; get your *habeas corpora juratorum*, and alter the return to the next return-day after the next sittings, and re-seal it, pay 1d.; annex it to the record again, and get the clerk of the treasury, Mr. Jefferies, to alter the jurata to the same return as the *habeas corpora juratorum*; there is no occasion to have a new pannel returned, nor a new stamp.

How, if cause made a *remanet* in town.How, if a *remanet* in the country.

In the country.

If the cause is made a *remanet* at assizes, application must be made to the associate for the record, to which are annexed the *venire*, *disfringas*, and pannel; make the proper alterations in the returns and day of the sittings therein; then carry the record to the *nisi prius* office to be re-sealed, and the *venire* and *disfringas* to the seal office, where is paid for re-sealing each one penny; annex them together, and leave them again with the associate, to whom is paid 5s. for making it a *remanet*.

Whenever cause is a *remanet*, it is absolutely necessary to alter the *jurata*. See the case of *Crowder v. Rooke*, before cited. 2 *Wil.* 144.

By R. E. 33 Geo. 3. it is ordered, that the writs of *disfringas* and the records in causes, which stand over from one sitting to another, be regularly re-sealed previous to the sitting to which they stand over, or in default thereof the causes be not tried.

It is now settled in both courts, (though formerly otherwise,) that in all cases, where a cause goes down to trial, and goes off upon any occasion without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial, the costs of such former abortive going to trial shall be taxed and allowed to the party finally prevailing, in the same manner as if the cause had gone off upon a *remanet*. *Burchall v. Bellamy*, Burr. 2693. Before it was confined to the single case of a *remanet*.

And on trials by *proviso*, where plaintiff and defendant both carry down the record at the same time, the trial shall

How as to costs in case of *remanet*, or the cause going off on other grounds.On what record to proceed when trial by *proviso*.

be on the plaintiff's record, if he enters it with the marshal; but if he refuses or omits to enter it, defendant may proceed on his record.

SECTION VI.

Of Special Juries.

Introduction of
special juries.

Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. 3 Blac. Com. 357.

Now to be had
in any case;
but unless judge
certifies, costs
not allowed.

And indeed before the statute of 3 Geo. 2. as appears by the preamble, it was doubted whether special juries could be had in any common cause at *nisi prius* without consent. Now, indeed, it may be had in all cases; but unless the judge at the trial be of opinion that it is a cause of sufficient importance to warrant a special jury, he will not certify, and the party will not be allowed the *extra* costs thereof, though he have a verdict.

Stat. 3 Geo. 2.
c. 25. as to
special juries.

By the 3 Geo. 2. c. 25. s. 15. "Whereas some doubt hath been conceived, touching the power of his Majesty's courts of law at Westminster, to appoint juries to be struck before the clerk of the crown, master of the office, prothonotaries, or other proper officer of such respective courts, for the trial of issues depending in the said courts, without the consent of the prosecutor or parties concerned in the prosecution or suit then depending, unless such issues are to be tried at the bar of the said courts; Be it declared and enacted by the authority aforesaid, that it shall and may be lawful to and for his Majesty's courts of King's Bench, Common Pleas, and Exchequer at Westminster respectively, upon motion made on behalf of his Majesty, his heirs or successors, or on motion of any prosecutor or defendant in any indictment, or information for any misdemeanor, or information in the nature of a *quo warranto*, depending, or to be brought or prosecuted in the said court of King's Bench, or in any information depending or to be brought or prosecuted in the said court of Exchequer, or on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action, cause, or suit whatsoever depending or to be brought and carried on in the said courts of King's Bench, Common Pleas, and Exchequer, or in any of them; and the said courts

"are hereby respectively authorized and required, upon motion as aforesaid, in any of the cases before-mentioned, to order and appoint a jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been, and are usually struck in such courts respectively, upon trials at bar had in the said courts; which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue."

By the 24 Geo. 2. c. 18. "The person or party who shall apply for a special jury, shall not only bear and pay the fees for striking such jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury; and shall not have any other or further allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the judge, before whom the cause is tried, shall, immediately after the trial, certify in open court, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

And, by the same statute, "No person that shall serve upon a special jury, or be returned, shall be allowed, or take for such serving on any such jury, more than the judge who tries the cause shall think reasonable, not exceeding 1 l. 1 s. excepting causes where a view hath been directed."

Stat. 24 Geo. 2. c. 18. As to special juries, and judge certifying.

If a special jury is required, get counsel's signature to brief indorsed, To move for special jury; it is a matter of course, pay 10s. 6d. go for rule thereon at clerk of rules in B. R. or secondary in C. B. and then get appointment from the master in B. R. or prothonotary in C. B. to nominate the forty-eight; serve copy on attorney of the other side, and also on the sheriff; pay master or prothonotary and sheriff two guineas each; then clerk will make out copies for each party, pay 2s. 6d. in B. R. 5s. in C. B. When you are ready to strike, procure another appointment from the master or prothonotary; serve copy of rule again, with the second appointment on the opposite attorney; attend accordingly on master or prothonotary, who will strike out twenty-four, i.e. twelve on each side, plaintiff first objecting; and the other twenty-four will be specially named in distringas, or habeas corpora juratorum.

How to get special jury.

It is generally settled between the parties who shall sue out the distringas, or habeas corpora juratorum. It seems, however, that in C. B. the party whose special jury it is should, in strictness, sue out habeas corpora juratorum; but in B. R. the plaintiff must do it, notwithstanding it is defendant's special jury.

On a motion for a special jury, no notice of the motion or affidavit of the facts is necessary.

Of the operation
of the stat.
3 Geo. 2. and
24 Geo. 2.

It may be here observed, that the statute 3 Geo. 2. which is for the regulation of juries merely, gives the subject a liberty of having a special jury in all cases whatever, which before that statute was only granted under certain circumstances. This general licence being too often abused, the 24 Geo. 2. afterwards enacts, That no costs of such special jury shall be allowed, unless the judge certifies; but the manner in which that special jury is to be returned, and the other incidents relating to them, remain just the same as before the passing of that act: For the statute of 3 Geo. 2. which specifically directs in what way juries are to be returned, and the like, does not extend to special juries. The method, therefore, of proceeding by special juries is in no respect altered, but must be in the same form and in the same manner as before the act. See the case of *The King v. Perry*, 5 D. & E. 463.

In what time
special jury
should be
moved for.

Motion in C. B. for a special jury, as of course; but, before the rule was drawn up, the secondary doubting, prayed the direction of the court; and it appearing that common jury process had been awarded, issued, and returned, and that the cause stood as a *remanet* in the chief justice's paper, the court refused to grant a special jury; though, in the country causes between assizes and assizes, the practice is otherwise. Bar. 461. *Dobson v. Stevens*.

In C. B.

So after a *venire facias* and return filed, the court held the motion for a special jury too late. *Clarke v. Sheppard*, Bar. 488.

After a common jury returned in Middlesex, and the cause made a *remanet* by consent, at the sitting after last term, defendant moved for a special jury, offering to take notice of trial for the second sitting in this term, and obtained a rule to shew cause, which was discharged. *Per Cur.* this has been done between assizes and assizes, but we cannot delay plaintiff in this case, without consent. Death or other accident may happen. Bar. 449. *Croft v. Skipwith*.

Rule in B. R.

It is observable, that the above cases are in the Common Pleas, for in King's Bench the time is fixed by a late rule of court, Trinity term 30 Geo. 3. 1790; whereby it is ordered, That no cause for the future be tried by a special jury, unless the rule for such special jury be drawn up, and the cause marked, as a special jury, in the marshal's book of causes, before the adjournment-day after each term: If either of the parties shall neglect to attend the master or prothonotary striking a special jury, the master or prothonotary, on behalf of the absent party, shall strike out twelve names. Trin. 8 W. 3. 2 Lil. Pract. Reg. 122, 123. 1 Sal. 405.

Court was moved for directions to the master to strike out twenty-four of the special jury *ex parte*, in case the defendant and his agents should omit to attend the master's next appointment. The motion was founded on an affidavit of three appointments having been made, and their declining to strike out *till a day should be appointed for the trial*. The special jury had been nominated in last term, but the twenty-four had not been struck out by the parties, and the cause was not then tried, but was intended to be tried at the sittings after this term. The defendant's attorney attended the master's third appointment to strike out, but declined doing it, for the reason above-mentioned. Lord Mansfield was clear the master might do it without any direction from the court, and declined giving him any in particular; but had no doubt he might do it now just as if he had proceeded last term, and that it was right for him to act as usual, unless there should appear any particular reason to the contrary. *Reu v. Hart*, Cow. 412.

How master may proceed *ex parte* to strike special jury.

It is no reason why the same jury should not serve for the trial of a cause, which has been already struck for a former intended trial, merely because there had been a change of sheriffs in the mean time. *Ibid*.

Same jury may serve, though sheriff changed.

So held also in C. B.

The King v. Perry and others, Mich. 5 D. & E. 453. This was an information for a libel. A special jury had been moved for, and struck in the usual manner. The information went down to trial; on calling over the special jury, only part appeared. No tales was prayed by either party, and the cause was made a *remanet*. In this term, Wood moved for a new special jury. On the day appointed before the master for striking it, the defendant's attorney did not attend, and it was struck *ex parte*. Erskine afterwards moved for a rule to shew cause why Mr. Wood's motion for a new special jury should not be discharged, on the ground that defendant wished for the first special jury, and that he was entitled to have them by the cause. Bearcroft shewed cause, insisting, that it was a rule of course to strike a new special jury; the same jury was not to attend affize after affize; that there was an end of the original *venire* and *distringas*, and a new one should now issue. But Mr. J. Buller read a MS. case of *The King v. Franklin*, which was an information for the libel called the Craftsman; when this very question was solemnly argued, and the court determined that the same jury ought to try the cause, and that neither party could insist upon a new special jury, but that an *alias distringas* to the first jury should issue.

If after a special jury struck, the cause goes off for default of jurors, no new jury can be struck, but the cause must be tried by the jury first appointed.

He also mentioned the form of the *distringas*, as a reason why it should be the same jury; for, when the twenty-four are struck out of the forty-eight, and a *distringas* issues, the *distringas* is returned, with the names of the jury specially inserted, they are put on the record; and how can they afterwards be got rid of? an *alias distringas* must therefore go, and the cause be tried by them. See the above case, where the subject is fully entered into.

An action of covenant upon a charter-party was tried at the bar in Middlesex, by a special jury of the citizens of London, who all consented to be sworn, and waived any privilege as citizens of London, in not being obliged to go out of the city to serve on juries. *Lockyer v. E. I. Company*, 2 Wil. 136.

SECTION VII.

Of granting a View.

Authorized by
stat. 4 & 5 Ann.
and 3 Geo. 2.

4 & 5 Ann.
c. 16.

Special writs of
distringas and
habeas corpora
to issue for that
purpose.

3 Geo. 2. c. 25.
f. 14.

The practice of granting a view is founded upon the statutes 4 & 5 Ann. c. 16. f. 8. and 3 Geo. 2. c. 25.

By the first of these it is enacted, "That in any actions brought in her Majesty's courts of record at Westminster, where it shall appear to the court that it will be proper and necessary that the jurors who are to try the issues in any such actions should have the view of the messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trials of such issues in every such case, the respective courts, in which such actions shall be depending, may order special writs of *distringas* or *habeas corpora* to issue; by which the sheriff, or such other officer to whom the said writs shall be directed, shall be commanded to have six out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who then and there shall have the matter in question shewn to them, by the persons in the said writs named to be appointed by the court; and the said sheriff, or other officer who is to execute the said writs, shall, by a special return upon the same, certify that the view hath been had, according to the command of the said writs."

And by 3 Geo. 2. c. 25. f. 14. "Where a view shall be allowed in any cause; in such case six of the jurors named in such pannel, or more, who shall be mutually consented to by the parties or their agents on both sides, or if they cannot

" cannot agree, shall be named by the proper officer of the
 " respective courts of King's Bench, Common Pleas, Ex-
 " chequer at Westminster, or the Grand Session in Wales,
 " or the counties palatine for the causes in their respective
 " courts; or, if need be, by a judge of the respective courts
 " where the cause is depending, or by the judge or judges
 " before whom the cause shall be brought on to trial respec-
 " tively, shall have the view, and shall be first sworn, or
 " such of them as appear upon the jury to try the said cause,
 " before any drawing as aforesaid; and so many only shall
 " be drawn, to be added to the viewers who appear, as
 " shall, after all defaulters and challenges allowed, make up
 " the number of twelve, to be sworn for the trial of such
 " cause."

The 4th of Ann. does not extend to criminal cases, so that in them there can be no rule for a view without consent.

As the above statutes are clearly and fully explained, and the whole doctrine of granting views settled and laid down in 1 Burr. 253. I shall content myself with reciting at length what that reporter has said upon the subject.

Great inconvenience had arisen from the abuse of views, and their being perverted into means of delay, to the intolerable hindrance of justice. Some late instances shewed the mischief in a glaring light; and the example being once set, there was no doubt it would be followed.

After the 4 & 5 Ann. c. 16. s. 8. views were granted upon motions of course; and upon this act, and 3 G. 2. c. 25. s. 14. a motion prevailed, " That six of the first twelve upon the pannel must view and appear at the trial; if they did not, there could be no trial, and the cause must go off."

Where either party wished delay or vexation, he moved for a view. A thousand accidents might prevent a view, or six of the first twelve from attending the view, or their attending the trial: he who wished them not to attend, might, by various ways, bring it about. Where a defendant in possession was well liked, and the plaintiff a stranger, or unpopular, gentlemen of themselves found excuses, especially if the view was troublesome and at a distance. Causes in several counties had, at a great expence, been repeatedly carried down and put off, either because there was no view, or because six of the first twelve did not attend the view, or did not attend the trial; though twelve viewers should appear at the trial, yet, according to the notion which prevailed, if six of the first twelve upon the pannel were not among them, the cause could not be tried.

Former inconvenience from abuse of this privilege.

Views formerly granted of course, and supposed that six of the first twelve must be viewers;

productive of delay.

The

How abuses remedied.

The tendency of this abuse to delay, the vexatious expence, and the obstruction of justice, was so manifest, that the court thought it their duty to consider of a remedy: and at Mich. term 1757, and at other times, Lord Mansfield informed the bar to the following effect: "That they had conferred together upon the abuse of views, and considered of a remedy in the power of the court."

How the matter stood before the statute of Ann.

Before the 4 & 5 Ann. c. 16. s. 8. there could be no view till after the cause had been brought on to trial. If the court saw the question involved in obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the court, or judge at the trial, "that the nature of the question made a view not only proper and necessary;" for the judges at the assizes were not to give way to the delay and expence of a view, unless they saw that the cause could not be understood without one. However, it often happened, in fact, that, upon the desire of either party, causes were put off for want of a view, upon specious allegations from the nature of the question, "that a view was proper," without going into the proof, so as to be able to judge whether the evidence might not be understood without it.

Why that statute enacted.

This circuitry occasioned delay and expence; to prevent which, the 4 & 5 Ann. c. 16. s. 8. empowered the courts at Westminster to grant a view in the first instance previous to the trial.

As a view might be of use, and, in this shape, was attended with no delay, and but little expence, it became the practice to grant them of course upon the motion of either party.

How 3 G. 2. construed.

The 3 G. 2. c. 25. s. 14. provides, "That, where a view shall be allowed, the jurors who have had the view shall be first sworn (or such of them as shall appear) before any drawing;" which means in apposition to such other jurors as are to be drawn by ballot; and not to establish, "that six at least of the first twelve shall be sworn."

This strict construction cause of abuse.

Real construction of 4 & 5 Ann. that it is discretionary in court to grant view.

Upon a strict construction of these two acts in practice, the abuse, which is now grown into an intolerable grievance, has arisen. Nothing can be plainer than the 4 & 5 Ann. c. 16. s. 8. The courts are not bound to grant a view of course; the act only says, "they may order it where it shall appear to them that it will be proper and necessary."

It is infinitely better that a cause should be tried upon a view had by any twelve, than by six of the first twelve; or by

by any fix, or by fewer than six; or even without any view at all, than that the trial should be delayed from year to year, perhaps for ever. It can never be proper or necessary to grant a view which is asked and used for so unjust a purpose.

There have been instances of great causes put off for years; and though even nine, ten, or eleven viewers have attended, yet upon objection, "that they were not six of the first twelve," the cause has been put off, and a view moved for again, as of course, by the party who had availed himself of so glaring a chicanery.

We are all clearly of opinion, that the act of parliament meant a view should not be granted, unless the court was satisfied that it was proper and necessary.

The abuse to which they are now perverted makes this caution our indispensable duty; and therefore, upon every motion for a view, we will hear both parties, and examine (upon all the circumstances which shall be laid before us on both sides) into the propriety and necessity of the motion; unless the party who applies will consent to and move it, upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side, and the obstruction of justice.

Lord Mansfield having made this declaration, his Lordship desired the gentlemen of the bar to think of it; and if any objections should occur, to mention them.

The expedient proposed by the court was universally approved.

The first instance happened in Hilary term 1757, in a great cause between *Pierce* and *The Earl of Faulconberg* and others; which was an issue out of Chancery often tried at Durham by special juries, and now ordered to be tried at bar by special jury from Yorkshire. (See the rule at large, together with the addition of the consent, part *infra*, pa. 453, 454.)

Subsequent to this was the cause of *The Earl of Darlington* v. *George Bowes* Esq.; which was an issue out of Chancery, and had been thrice carried down to be tried at Durham, (where there are assizes only once a year,) at a great expence, and every time put off by the defendant, upon objections on account of the view. Once nine viewers appeared; but they were not six of the first twelve. Another time, only four viewers appeared at the assizes. In 1757, a view was granted by mutual consent upon terms; but, by an accident (of a fall from his horse) the judge of assize was prevented from trying it. The defendant Bowes moved in Trinity term 1758 for a view, but refused to renew his former consent, or to come into any terms; insisting, that by law he was entitled to a view of course. The plaintiff had

Aburdity and inconvenience of the viewers necessarily being six of the first twelve.

How remedied, by the court being extremely strict in granting a view without party entering into consent-rule, that trial shall not be delayed.

First instance of this practice.

Another instance shewing the utility thereof.

had likewise moved for a view, consenting to the terms: both motions were adjourned to the last day of the same Trinity term 1758; when the court, upon all the circumstances, rejected the defendant's motion, unless he should consent (within a week) to the terms proposed;—he would not consent. The cause came on to be tried at Durham, without a view, before Mr. Baron Smythe. It happened many of the jurors had viewed upon some of the former occasions; a verdict was given for the plaintiff to the satisfaction of the judge. The defendant moved the court of Chancery for a new trial, because he had been refused a view, and because it might be fit to have another trial before his inheritance was bound: Mr. Baron Smythe certified, “that he was satisfied with the verdict;” and also, “that a view was totally unnecessary, there being no dispute concerning the locality, discrimination, or limits of the premises, but merely a question, To whom certain lands belonged?” The court of Chancery thought proper to grant another trial; but approved of denying a view, unless he renewed his consent, and made it part of the order for a new trial, “that he should consent to the terms.” It was again tried before Mr. Justice Bathurst, and a verdict was found for the plaintiff to his satisfaction. The defendant moved the court of Chancery for a new trial, which was refused.

Had not the court put a check to granting views from time to time as of course, a rich defendant, conscious that the merits were against him, might, from pique or humour, or litigiousness, have kept off the cause as long as he lived for want of a view, upon a question where a view could not be of the least utility.

This new regulation of the mode of granting views fully approved.

The wisdom and fitness of what the court had done to regulate views was so fully manifested upon the occasion of this cause, and appeared to be so well justified by the authority given them by the act of parliament, and by every principle of justice and convenience, that no party has ever since moved for a view without consenting to the terms. And it is found in experience that views are now regularly had, and a competent number of viewers appeared at the trial. A view is not asked now, except in cases where it may probably be of use: and, as the non-attendance of viewers can now gratify neither party, both concur in wishing the duty performed.

The rule that was made in the first instance that happened after the expedient was proposed by the court, and was received with general approbation, as is above mentioned, was drawn up in the following words:

Saturday

Saturday next after fifteen days of Saint Hilary, in the 30th year of King George the Second. *Pierce Esq. v. Earl Faulconberg* and others :

Form of rule entered into between the parties.

" By consent of counsel on both sides, it is ordered, That there issue a *distringas juratores*, to be directed to the sheriff of the county of York ; in which shall be contained a clause, commanding the said sheriff to have six or more of the first twelve of the jurors to be impannelled and returned, to try the issue between the parties at the place in question, before the time of the trial of the said issue, to wit, upon, &c. ; and that B. R. on the part of the plaintiff, and T. W. on the part of the defendants, shall attend on the same day, and shew the matters in question to the said six or more of the first twelve of the said jurors ; and that the expences of taking the said view shall be equally borne by both parties, and no evidence shall be given on either side at the time of taking thereof."

" And by the like consent, it is further ordered, That in case no view shall be had, or if a view shall be had by any of the said jurors, (whether they shall happen to be any of the twelve jurors who shall be first named in the said writ or not,) yet the said trial shall proceed, and no objection shall be made on either side, either for want of a view, or that a view was not had by any of the twelve jurors first named, or for that it was not had by any particular number of the jurors named in the said writ, or for want of a proper return to the said writ.

The consent as to terms, no delay shall be occasioned.

" On the motion of Mr. Morton, of counsel for the plaintiff ; and Mr. Gould, of counsel for the defendants."

The cause was tried at the bar on the 7th of May 1757, and a full jury of viewers appeared.

The above-recited rule was for a view to be had by a special jury, and was made absolute at once, being consented to by both parties : But during the remainder of the same term (of Hilary 1757), and also during the three following terms (of Easter, Trinity, and Michaelmas 1757), the court, upon proper affidavits, granted like rules (*mutatis mutandis*) in cases that were to be tried by common juries, making them only " to shew cause," not absolute in the first instance. The next term (Hilary 1758) they made some of them " to shew cause," others absolute in the first instance, but none without proper affidavits. Soon after, *viz.* in Trinity term 1758, they made all these rules absolute in the first instance ; some upon affidavit, others as of course ; since which time they are become motions of course, without affidavit, a counsel's mere signature being sufficient.

This regulation came into common practice ;

first, as a rule to shew cause ;

afterwards granted in first instance ;

now mere motions of course.

The

The form of them is as follows :

If the trial is to be by a special jury, the rule runs thus :

Form of rule,
&c. in special
causes.

" It is ordered, That there issue a writ of *disfringas juratores*, &c. &c. taking thereof" (in the words of the first clause of the above-recited rule between *Pierce* and *Lord Faulconberg* and others). The additional clause is expressed in these terms : " The plaintiff (or the defendant, *viz.* the party who prays the view) consenting, that in case
" no view shall be had, or if a view shall be had by any of
" the said jurors, whether they shall happen to be any of
" the twelve jurors who shall be first named in the said writ
" or not, yet the said trial shall proceed, and no objection
" shall be made on either side on account thereof, or for
" want of a proper return to the said writ."

Form of rule,
&c. in common
jury causes.

The rule for a view, where the cause is to be tried by a common jury, could not continue the same since the balloting act (3 G. 2. c. 25.) as it was before, nor could it be exactly like that for views by special juries (by reason of the particular directions given by the 14th section of the balloting act); but it used to run much like it, only *mutatis mutandis*. The present form (since that act) is this : " It is
" ordered, That there issue a writ of *disfringas juratores*, to
" be directed to the sheriff of the county of Y. in which
" shall be contained a clause, commanding the said sheriff to
" have six or some greater number of the jurors to be im-
" pannelled and returned, to try the issue between the parties,
" who shall be mutually consented to by the said parties,
" or their agents, at the place in question, before the time
" of the trial of the said issue, to wit, upon, &c. and that
" R. R. on the part of the plaintiff, and T. W. on the part
" of the defendant, shall attend on the same day, and shew
" the matters in question to the said six, or some greater
" number of the said jurors, who shall be mutually con-
" sented to as aforesaid; and that the expences of taking
" the said view shall be equally borne by both parties; and
" no evidence shall be given on either side at the time of
" taking thereof."

The additional clause, now added to this rule, is in these words : " The plaintiff, or the defendant," (the party at whose instance the rule is prayed,) " consenting, that in
" case no view shall be had, or if a view shall be had by any
" of the jurors, whether they shall happen to be six or any
" particular number of the jurors, who shall be so mutually
" consented to as aforesaid, yet the trial shall proceed, and
" no objection shall be made on either side on account
" thereof, or for want of a proper return to the said writ."

1 Burr. 253 to 258.

In

In the Common Pleas the method is the same, except that, instead of the *distringas juratores* for a view, their process is the *habeas corpora juratorum*.

In C. B. Same practice, only habeas corpora juratorum instead of *distringas*. Mode of obtaining a view in term.

As to the mode of obtaining the rule, give brief to counsel with 10s. 6d. his signature is enough. Apply to the attorney on the other side for the name and place of abode, &c. of his shewer. Carry brief, with sufficient instructions as to time and place of meeting, &c. to clerk of rules, who will prepare rule. Serve copy on the attorney of the other side. Carry the original rule to sheriff's office; and, if it be a special jury, leave the names of jury at the same time; if a common jury, there is no occasion, as he knows them by the pannel: He will summon the jury agreeable to the rule.

In vacation this is done by a judge's order, counsel having signed brief, as before.

In vacation.

After the merits of the cause had been determined at the assizes by a special jury, after a trial of twenty hours, defendant moved to set aside the verdict, upon affidavit that plaintiff's shewer, at a view pursuant to a rule of court previous to the trial, had misbehaved himself, by telling the viewers, This place is called Abrahall's Yat, and this Conygree-hill (which were not the places in question); and saying, These cottages pay Mr. Symons 5d. or 6d. a-year rent; defendant insisting, that nothing more than the place in question, which was one single cottage, should have been shewn to the viewers. Upon hearing counsel on both sides, the court discharged the rule; being of opinion, that on a view the shewers may shew marks, boundaries, &c. to enlighten the viewers; and may say to them, These are the places which on the trial we shall adapt our evidence to. The jury could have no light from looking at the cottage only. The question to be tried was, Whether it stood within Mr. Symons' manor, or not? Had an ancient man been produced to the viewers, and he had acquainted them that he had known the place many years, and given an account of the boundary, &c. this would have been improper, because it is giving evidence before the trial. *Goodtitle on demise of Symons v. Clark*, Bar. 457.

Of the conduct of the shewers who attend the viewers on the view.

SECTION VIII.

Of examining Witnesses on Interrogatories.

It is sometimes necessary to apply to the court for leave to examine witnesses on interrogatories; as if they are about to leave the kingdom before the trial, and not likely to return in

When necessary to examine witnesses on interrogatories.

Ground of application.

How leave obtained in term;

in vacation.

Other side must consent;

if not, how court will relieve.

This mode of examination allowed where witnesses live out of the reach of process;

by writ of *dedimus*.

But if the attendance of witnesses can be procured, depositions must not be read.

How to proceed when rule obtained.

in time, or the like; in which case, the party would be deprived of the benefit of their testimony.

This application to the court is founded upon an affidavit, that such person is a material witness, without whose testimony you cannot proceed to trial, and that he is on such a day going to the East Indies (or the like); it is a rule to shew cause, which afterwards must be made absolute, in the usual way.

If in vacation, it is done by judge's order.

As this is not strictly consistent with the rules of legal evidence, it is a matter *ex gratia*, and can only be done with the consent of the other party.

If, however, the request is reasonable and equitable, and justice is not likely to be administered without it, though the courts of law cannot immediately compel the other side to consent, yet they will prevent them from gaining any advantage by such obstinacy, and assist the party applying, by putting off the trial from time to time, until such consent be gained, or the material witness returns, or a bill in equity may be filed, or the like. *Fairly v. Newnham*, Do. 420.

Upon the same principle, if witnesses live out of the reach of the process of the courts, and cannot be compelled to attend, upon application of the court to have them examined before commissioners, specially appointed and approved of by the opposite party, and that such depositions should be read at the trial, if the other side will not consent, court will put off the trial for ever. *Moslyn v. Fabrigas*, Cow. 174.

In such examinations, a writ of *dedimus potestatum* issues, which is annexed to the interrogatories, and the commissioners certify the answers under their seals.

But if the party can procure the attendance of such witness at the trial, his depositions must not be read. *How v. Aitoni*, 12 Mod. 493.

As if a witness going to sea be examined by interrogatories before a judge, and the trial comes on before he is gone, his deposition shall not be read, but he must appear; for the rule, in such case, is made on a supposal of his absence. *Sal. 691. Anon.*

When the rule is made absolute, a copy thereof must be served on the attorney of the other side, together with a notice of the time and place such witness is to be examined, and also a copy of the interrogatories to be administered to him. The other side may then also draw up interrogatories, by way of cross examination of such witness, and send them to the judge's chambers. The witness, at the time appointed, is taken to the judge's chambers, and is examined by the judge's clerk, and sworn upon the interrogatories on both sides, after which the clerk makes out copies of

of the depositions. The interrogatories must be signed by counsel, see 11. 18. and engrossed on a twelve penny stamp parchment. The depositions are afterwards produced, and read at the trial.

The form of interrogatories for the examination of a witness.

Interrogatories for } Interrogatories to be administered to E. F. a Form of inter-
the plaintiff. } witness to be produced, sworn, and examined on rogatories for
the part and behalf of A. B. plaintiff, in a certain cause, now depend- plaintiff;
ing in the court of our lord the King, before the King himself, against
C. D. defendant therein, before Sir Francis Buller baronet, one of his
Majesty's justices of the court of King's Bench, pursuant to a rule of the
said court made, on next, after in the 34th year of
the reign of King George the Third: (or, if an order, say, pursuant
to an order of the said Francis Buller, made the day of)

Imprimis, Do you know the parties, plaintiff and defendant, in the
title of these interrogatories named, or either of them, and which of
them, and how long have you known them, either, or which of them?
Declare.

Secondly, Do you, &c. (and so on, putting the questions necessary
for his evidence).

Lastly, Do you know of any other matter or thing, or can you say any
thing touching the matter in question in this cause, that may tend to the
benefit and advantage of the complainant in this cause, besides what you
have been interrogated thereto? Declare the same fully and at large, as
if you had been particularly interrogated thereto.

Interrogatories for } Interrogatories to be administered, &c. (as be- for defendant;
the defendant. } fore).

Great nicety is required in drawing interrogatories; and
particular care must be taken, that the questions are not too
leading.

Form of interrogatories for the cross examination of the
same witness.

Interrogatories to be administered to and examined on the part and for cross exam-
behalf of A. B. plaintiff, in a certain cause now depending in, &c. as mination of
before, against C. D. defendant therein, by way of cross examination witnesses.
to certain interrogatories to be administered to the said E. F. on behalf
of the said plaintiff, before Sir Francis Buller, &c. as before, pursuant
to a certain rule, &c. as before.

SECTION IX.

Of compelling Witnesses to appear at the Trial.

(A) Of the Process for that Purpose, and its Incidents.

(B) Of the Expences of Witnesses, and how paid.

(C) Of the Remedy against them in case of Disobedience.

(A) (A) Of the Process for that Purpose, and its Incidents.

Of the process to compel appearance of witnesses.

As it is incumbent upon the parties in the suit to prove by evidence the matter in issue between them, and as the witnesses, who alone can prove the material facts, may be either inimical, or at least indifferent to the cause, or unwilling to attend, it is obviously necessary for the administration of justice, and the investigation of truth, that there should be some compulsory process to bring in such unwilling witnesses under the terrors of punishment, in case of disobedience.

By subpoena.

This process, in both courts, is by writ of *subpoena ad testificandum*; the form whereof being somewhat different in the two courts, is as follows:

Form of subpoena for affizes.
Four witnesses may be put in one subpoena.

In B. R.
George the Third, &c. to A. B. C. D. E. F. and G. H. greeting: We command you, that, all and singular businesses and excuses being laid aside, you, and every of you, do and appear in your proper persons before our justices assigned to hold the assizes in and for the county of Surrey, according to the form of the statute, &c. on Wednesday, the fifth day of July next, (the day of the assizes,) by nine of the clock of the forenoon of that day, at Guildford in the said county, then and there to testify all and singular those things which you and either of you know, in a certain action now in our court before us depending, between J. B. plaintiff, and T. I. defendant, (if

In C. B.
George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. to A. B. C. D. E. F. and G. H. greeting: We command and firmly enjoin you, and each of you, that, laying all other matters aside, and notwithstanding any excuse, you be in your proper persons before our justices at the assizes, to be held at in the county of on the first day of August (the first day of the assizes) next ensuing, to certify and speak the truth in a certain matter of controversy pending undetermined in our court, before our justices at Westminster, between J. B. plaintiff, and T. I. late of K. in the said county of gentleman,

by original, add his addition,) of a plea of trespass on the case (or whatever the action is) on the part of the plaintiff, (or defendant, if his witnesses,) at the aforesaid day, to be tried by a jury of the county; and this you, nor any of you, are in nowise to omit, under the penalty of each of you of 100l. Witnesses, &c. Mansfield & Way.

If at the sittings in Westminster, say, before our right trusty and well-beloved Lloyd Lord Kenyon, our chief justice assigned to hold pleas in our court before us, on Monday the 24th of June next, (the day of the sitting,) by nine of the clock in the forenoon of that day, at Westminster Hall in the county of Middlesex (or if in London, say, at the Guildhall of the city of London). Blank writs may be bought at the stationer's.

You pay for signing the subpoena 1s. 8d. sealing 7d. and then you take out a subpoena-ticket for each witness to the following purport, and serve each witness with a copy; pay him 1s.

To Mr.

By virtue of a writ of subpoena to you directed, and herewith shewn unto you, you are commanded personally to be and appear before Lloyd Lord Kenyon, chief justice of his Majesty's court of King's Bench, on Monday the fifteenth day of July instant, by eight of the clock of the forenoon of the same day, at Westminster Hall in the county of Middlesex, to testify the truth, according to your knowledge, in a certain cause now depending, and there to be tried, between I. B. Esq. plaintiff, and T. I. defendant, in a plea of trespass on the case on the part of the defendant; and hereof you are not to fail, upon pain of one hundred pounds. Dated the 10th of July in the thirty-fourth year

gentleman, defendant, in a plea of trespass (as the action is), and this you are not to omit, nor is any one of you to omit, under the penalty of each of you of 100l. Witness, Sir James Eyre knight, at Westminster, the day of in the 37th year of our reign.

Prothonotary.

If the trial be to be had in London, you say, before Sir James Eyre, our chief justice of the court of King's Bench, at Guildhall, London, on (the day of the sittings), to testify, &c.

If in Middlesex, thus: Before Sir James Eyre knight, our chief justice of the Bench at Westminster, in the great hall of pleas there, called Westminster Hall, to testify, &c.

When the subpoena is filled up, the duty whereof is 2s. carry it to the proper prothonotary to be signed, for which you pay 1s. and to the seal-office to be sealed, for which you pay 7d. and then you make out tickets for each of the witnesses, in the following form: Serve each witness with a copy.

Teste it the last day of term.

For trial at Westminster and London.

How subpoena filled up, &c.

Subpoena-ticket how to be served.

Mr.

By virtue of a writ of subpoena to you directed, and herewith shewn unto you, you are commanded personally to be and appear before his Majesty's justices of assize (or the chief justice, as before directed, according as the case is) on the day of by of the clock in the forenoon of the same day, to testify the truth, according to your knowledge, in a certain cause now depending, and there to be tried, between A. B. plaintiff and C. D. late of in the county of gentleman, defendant, in a plea of trespass (as the action is) on the part of the plaintiff, (or the defendant, if at his instance subpoenaed); and hereof you are not

Form of ticket.

year of the reign of our sovereign lord George the Third, king of Great Britain, &c. in the year of our Lord 1798. to fail, upon pain of one hundred pounds. Dated the day of in the year of our Lord 1798, and in the year of the reign of our sovereign lord George the Third, king of Great Britain, &c.

By the Court.

T. S. attorney for defendant.

George the Third, king of Great Britain, &c.

J. R. Attorney.

Of subpœna
duces tecum.

If any person has in his possession any writings, deeds, books of accounts, or other things which it may be necessary to produce on the trial of the cause, or on the execution of the inquiry, he should be served with a *subpœna duces tecum*, commanding him to bring with him, and produce the same at the trial of the cause, or execution of the inquiry: which *subpœna* is like the former, only you insert a clause, after mentioning the place of trial or inquiry, to the following effect:

Form thereof.

“ And also that you bring with you and produce at the time and place aforesaid, a certain deed or instrument in writing, bearing date, &c. (describe the thing to be produced,) then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain action now in our court, before us depending, &c. It is signed and sealed as before.

How far obligatory.

But an attorney is not obliged to obey a *subpœna* with a *duces tecum* of papers belonging to his client, served upon him to found a prosecution by indictment against his client for forging them. *Rex v. Dixon*, Burr. 1637.

When a notice only to produce papers, &c. will do.

But if the requisite papers, letters, &c. are in possession of the plaintiff or defendant, or the respective attorneys in the cause, a common written notice to produce them will be sufficient.

How witness in custody to be brought up.

If the witness be in custody, he must be brought up by *habeas corpus ad testificandum*.

Make an affidavit,

Affidavit to obtain *habeas corpus*.

That A. B. now a prisoner for debt, in custody of , is, and will be, a material witness for this deponent in the trial of this cause. And this deponent further saith, that he is advised, and verily believes, that he cannot safely proceed to the trial thereof, without the testimony of the said A. B.

Swear affidavit before a judge, who will grant his fiat for *habeas corpus*. Ingross writ of *habeas corpus* on 5s. stamp parchment, get judge's name indorsed thereon: It must be signed and sealed as *subpœna*; then leave it at marshal's or gaoler's, in whose custody witness is; and, at same time, tender his reasonable charges for bringing him up, otherwise he is not bound so to do.

The

The *habeas corpus* cannot be obtained either by motion in court, or before a judge, without an affidavit made by the party applying, that the witness is a material one. *The King v. Lyster*, Fort. 396. *Rex v. Burbage*, Burr. 1440.

Necessity thereof.

And it must be signed by a judge, or it is nugatory. *Rex v. Roddam*, Cowp. 672.

Habeas corpus how signed.

The court will not grant a *habeas corpus ad testificandum* to bring up a prisoner of war, it must be done by an order from the secretary of state; or he may be examined on interrogatories. *Furly v. Newnham*, Do. 420.

Who may or who may not be brought up by habeas corpus; prisoners of war;

Sailors on board a ship cannot be brought up by *habeas corpus* against their consent as prisoners; but on affidavit that they have been served with subpœnas, and are willing to attend, judge will grant an *habeas corpus* to the commander of the ship to bring them up. *Rex v. Roddam*, Cowp. 672.

sailors;

It was formerly held, that a prisoner in execution could not be brought up to give evidence by *habeas corpus*, as it would operate as an escape in the warden or marshal. Comb. 17. 48. *Burdus v. Shorter*, Bar. 222.

prisoners in execution.

But in the *King v. Burbage*, Burr. 1440. on such a motion it is said that lord Mansfield agreed, that in general a *habeas corpus ad testificandum* will lie to remove a person in execution to be a witness; but refused that application, thinking it, under the circumstances of the case, a mere contrivance.

Witnesses ought to have a reasonable time to put their own affairs in such order, that their attendance upon the court may be of as little prejudice to themselves as possible; and the court of B. R. held, that notice at two in the afternoon in the city to attend the sittings that evening at Westminster, was too short a time. *Hammond v. Stewart*, Str. 510.

Reasonable time must be allowed witnesses for their attendance.

But if the witness happens to be in court at the trial, a subpœna ticket then served upon him is sufficient. Cowp. 845.

But if in court, he may be then served with subpœna.

And this, although he is defendant's attorney, and his evidence is against his client.

If the defendant's attorney, who is a subscribing witness to an agreement upon which the plaintiff brings his ejectment, refuse to give evidence of his attestation, &c. upon service of a subpœna upon him in court for that purpose, the court, out of which the record issues, will grant an attachment against him. *Doe on dem. Jupp v. Andrews*, Cowp. 845.

Even though defendant's attorney.

Service of a subpœna should be personal service, otherwise the court will not grant an attachment, though perhaps an action might lie. *Small v. Whitmill*, Str. 1054.

Subpœna must be personally served.

(B) (B) Of the Expences of Witnesses, and how paid.

Expences must be tendered.

No witness is obliged to attend, unless his reasonable expences are tendered him by the party wanting his testimony.

Quantum thereof;

The quantum of these expences must be governed by the circumstances of the case.

must be sufficient.

Two guineas for a witness to come from Chester to Guildhall held not sufficient. *Chapman v. Pointon*, Str. 1150.

There should be enough tendered to cover the whole expences of the journey, and of the necessary stay at the place of trial. *Fuller v. Prentice*, 1 C. B. T. R. 49.

When tender must be made.

The tender of expences must be made when the subpœna is served. *Ibid.*

Consequence of neglecting it.

For even if without such tender being made, the witness attends at the trial, and his expences are there tendered, it is not good; but he may refuse to give testimony. *Bowles v. Johnson*, Blac. 36.

For a person not properly subpœnaed, is to be looked upon only as a stander-by; and it is no contempt of the court for a stander-by to be refused to be examined.—*Ibid.*

When a subpœna is served on a witness in London, a shilling is usually given; but if he is at any distance, and must reasonably incur expence to attend the trial, it should be tendered him.

For in no case is a witness obliged to trust to the court allowing him more when he comes to be sworn; perhaps the party may not call him, and then it may be difficult for him to get home again. Str. 1150.

Contingent losses not allowed in costs.

Any contingent losses which witnesses may suffer by obeying the subpœna, cannot be allowed on the taxation of costs. *Theellusson v. Staples*, Do. 438.

(C) (C) Of the Remedy against Witnesses in case of Disobedience.

Two modes, by attachment and by action;

If the witness be properly served with the subpœna, and his expences tendered, and he refuses to appear and give evidence on the trial, there are two remedies at the election of the party; the one a criminal proceeding by attachment, the other a civil proceeding by action.

by attachment;

The remedy by attachment is a modern proceeding; the C. J. in 22 G. 2. said he remembered the first motion for them; and it was a long time after the court of King's Bench had adopted this mode, that the court of Common Pleas

Pleas would accede to it. *Huffe v. Towke*, Bar. 33. *Chapman v. Pointon*, Str. 1150.

But in 25 G. 2. *Friend v. Hope*, Bar. 36. a rule to shew cause why an attachment should not issue, was granted in C. B. and would have been made absolute had not the subpœna been irregularly served; and now both courts give this remedy by attachment, but proceed therein with great caution, expecting to be well satisfied of the subpœna having been properly served, and expences tendered, and the like. *Fuller v. Prentice*, 1 C. B. T. R. 49. *Bowles v. Johnson*, B.R. Blac. 36.

An attachment was granted against a bailiff for refusing to make an affidavit of the service of a subpœna upon a witness; which affidavit was necessary in order to found a motion for an attachment against him for his non-appearance; for a bailiff is in a very different situation from another man, being an officer of the court. *The King v. Rudge*, Blac. 432.

As to the civil proceeding by action, it may either be an action upon the case for damages, or the party may resort to his remedy under the stat. 5 Eliz. c. 9. s. 12. which gives a penalty of 10*l.*; and also such further recompence to the party grieved, as the judge of the court out of which the process issued shall award. This further recompence, therefore, must be assessed by the court; and upon that assessment an action of debt may be brought. So an action of debt may be brought for the 10*l.* penalty. *Pearson v. Iles*, Do. 556.

CHAP. X.

Of Trial and its Incidents.

SEC. 1. *Of Trials at Bar.*SEC. 2. *Of preparing Briefs, and attending Trials.*SEC. 3. *Of challenging the Jury and of Talesmen.*SEC. 4. *Of nonsuiting at the Trial.*SEC. 5. *Of References at the Trial.*SEC. 6. *Of Demurrers to Evidence, and of Bills of Exception.*SEC. 7. *Of Verdicts and Cases reserved.*SEC. 8. *Of Judge's Certificates for Costs.*

SECTION I.

Of Trials at Bar.

Formerly the usual mode of trial.

FORMERLY all trials were had at *the bar* of the court in actions which were first commenced there; but this seldom happened, except in matters of consequence, as trifling suits were brought and determined in the court baron, hundred, or county court.

How fell into disuse;

But when it became the usage to bring actions of any trivial nature in the courts of Westminster, it was found to be an intolerable burden to compel the parties' witnesses and jurors to come from the distant parts of the kingdom to try such suits. A practice, therefore, very early obtained of *continuing* the cause from term to term in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose: and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre; afterwards the justices in eyre were superseded by the justices of assize, to whom, by statute of 13 Edw. I. a power was given to try all common causes; and now, by virtue of the commission of *nisi prius*, as it is called, all common causes are tried at the assizes in the country, and at the sittings at London and Westminster. For an explanation of this, see Introduction.

by continuing cause till justices of eyre come into the county.

Justices of eyre superseded by justices of assize.

Thus

Thus trials at bar fell into disuse, except in cases of difficulty and importance, and the terms were appropriated to legal arguments, and the multiplicity of business brought forward in the courts by motion.

Trials at bar only continued in cases of difficulty.

A trial at bar (which is a trial in term time before all the judges of the court) can only now be obtained by motion in court, and affidavit of the nature and intricacy of the cause: if obtained, it must be by special jury. The day of trial is appointed by the court; the cause is set down with the clerk of the papers in B. R. or secondary in C. B. and the record delivered to them.

Trial at bar what, and how obtained.

The granting of a trial at bar is entirely in the discretion of the court; and such a trial ought not to be granted without good reason, because it is very expensive to the parties, and the business of the other suitors is thereby delayed. Neither the length of a cause nor the value of the matter in question is a sufficient ground for granting a trial at bar; and in order to obtain one upon the account of difficulty, it is not sufficient to say generally in an affidavit, that the cause is expected to be difficult; but the particular difficulty which is expected to arise ought to be pointed out, that the court may judge whether it be sufficient for the granting of a trial at bar. *Rex v. Burgeses of Carmarthen*, Say. 79.

In discretion of court to grant it;

what sufficient ground for it;

when moved for by affidavit;

All questions concerning trials at bar must depend on their own circumstances; and the general rule to go by is the judgment which the court shall form on the nature of the issues and their dependencies. *The King v. Amery*, 1 D. & E. 366.

But if a judge of the court or master in chancery be a party to the suit, there shall be a trial at bar upon motion, without any affidavit. *Morton v. Hopkins*, 1 Sid. 407.

when no affidavit necessary;

As a trial at bar is a matter of favour, the court may impose what terms they please on the party applying; as that he shall receive only *nisi prius* costs and pay bar costs, or the like. *Holmes v. Browne*, Do. 426.

terms imposed on granting it;

A trial at bar is not allowed by the court to be in an issuable term, unless the crown is actually concerned in the interest. And. 271. 237. N. on R. Mic. 4 Ann. *Corporation of London v. Lynn*, 1 C. B. T. R. 206. *Denn v. Lord Cadogan and Others*, Burr. 273.

whether allowed in an issuable term;

A cause cannot be tried at bar where the action is laid in London, by reason of their charter, 2 Sal. 644.; because the granting a trial at bar when the venue is laid in London, would be contrary to a charter by which the citizens are exempted from serving as jurors out of this city. Str. 356.

or if venue be in London;

Unless

or if in county palatine;

not granted the same term it is moved for;

nor till issue joined;

except in ejectment.

Trial at bar must be moved for in court.

Of countermanding notice.

Of obtaining a second rule.

How many days notice of trial necessary.

How to be entered for trial.

Of delivering copies of issue to the judges.

New trial after trial at bar.

How if the jury do not attend the trial. Of the decem tales, &c.

Unless the citizens waive their privilege, and consent to be sworn as jurymen; in which case such trial may be had. *Locker v. E. I. Company*, 2 Will. 136.

Q. Whether an action depending in a court of a county palatine can be tried at bar; and whether the court of B. R. can compel the inhabitants of the county palatine to attend as jurors on such trial? *Gally v. Clegg*, Say. 47. *The King v. Amery*, 1 D. & E. 366.

Nor will it be granted the same term it is moved for. *Cooke's Rep.* 66. It must be moved one term to be tried the next.

The court will not grant a trial at bar till issue is joined; because it would be *infra dignitatem* to grant it till they knew whether the issue joined would be a matter of difficulty or not. *Case of the Borough of Christ Church*, Str. 696.

But an ejectment cause is an exception to this rule; in which, as issue is seldom joined till the term is over, it would, in general, be too late to apply for such trial after it is joined. *Anon.* Say. 155.

Trial at bar must be moved for in court, and the day is always appointed by the court; but yet the plaintiff is at liberty to countermand the notice of trial, and to prevent the cause being tried on that day; which if he does, it cannot be again brought to trial, unless some day be appointed by the court.

A second rule cannot be made for a trial at bar between the same parties in the same term; nor can it be in an issuable term. *Cantillon v. Lord Montgomery*, Fitzgib. 267.

A trial at bar was put off because the jury were not summoned in proper time. Six days notice, *per* Foster, ought, at least, to be given. *Rex v. Owen*, Say. 30.

The plaintiff's attorney must, before the *esoin* day of the term in which the cause is appointed to be tried, give notice to the chief prothonotary, or his secondary, of the day on which the cause is to be tried, that the same may be put down in the court book; and in case of neglect, and without motion and special direction of the court, such cause shall not be tried that term. *Hil. 6 Ann. in C. B.*

On trials at bar, the lord chief justice, and other judges, are to have copies of the issues in such causes delivered to them four days before the time appointed for trial. *Mich. 3 G. 2.*

Of late years, new trials have been granted after trials at bar as well as after trials at *nisi prius*. *Bright v. Eynon*, *Burr.* 395.

On a day appointed for a trial at bar, only nine of the jury appeared; plaintiff prayed for a *decem tales*: by the course of the court, the trial could not have come on again until

Michael-

Michaelmas term; this being Easter term, and the next an issuable term, wherein no trials at bar are allowed. As this would have been a great expence and delay to the parties, the court ordered a *decem tales*, and although this was on the Saturday, they ordered it to be returnable on the Monday following (though there had never been before an instance of it). *Denn v. Cadogan*, Burr. 273.

N. B. At common law, where a sufficient number of jurymen did not appear, a writ of *decem tales*, *octo tales*, and the like, was issued to the sheriff, which was for a supply of such men as were wanting; and this must still be done at a trial at bar, if the jurors make default. But at the assizes, or *nisi prius*, by stat. 35 Hen. 8. c. 6. and other subsequent statutes, the judge is empowered, at the prayer of either party, to award a *tales de circumstantibus* of persons present in court. 3 Blac. Com. 364.

SECTION II.

Of preparing Briefs, and attending at Trial.

Having taken every preparatory step for bringing on the cause to trial, nothing remains but to deliver briefs to counsel, and attend at the time appointed.

The brief should contain an abstract of the pleadings, a clear statement of the client's case, and a proper arrangement of the proofs, with the names of the witnesses. Of the brief.

The grand rule to be observed in the drawing of briefs is conciseness with perspicuity.

When the cause is in the paper for trial it is the duty of the plaintiff and defendant's attorney to attend the court, to see how the cause goes off; to take care that their counsel and witnesses have early notice when the cause is coming on, that they may be ready to discharge their respective duties. Of the attendance of the parties.

If the plaintiff's attorney is absent when cause is called on, the cause may be struck out of the paper, by order of the court, and he or his client be subjected to pay the costs of the day, for not trying cause according to notice, or he may be nonsuited. How, if attorney absent.

If defendant's attorney is absent, his client will lose the benefit of his defence, and be subject to costs.

The court will scarcely admit an excuse for the absence of plaintiff's or defendant's attorney, when their duty requires them to be present. They are allowed in their bill for their attendance while the cause is in the paper, and till tried, and it is expected and presumed by the court that they do attend. No excuse for non-attendance.

SECTION III.

Of challenging the Jury, and of Tales Men.

Of challenging
the jury.

When the cause is called on, the record is handed to the judge to peruse, that he may see the pleadings, and what issues the parties are to maintain and prove, while the jury is being sworn; at this time, therefore, it is necessary to attend to the names of the jury as they are called over, and before they are sworn, or to object to the former jury being sworn, which is generally done in common causes, if there be any person upon the jury that is exceptionable.

Either party
may challenge.

For either party has a right, upon good cause shewn, to challenge the jury, as it is called.

Two sorts of
challenges.

Now challenges are of two sorts, either to the array or to the polls.

Challenge to
the array, what.

Challenges to the array are, when an exception is made to the whole pannel in which the jury are *arrayed* or set in order, by the sheriff in his return to the jury process, and they may be made upon account of partiality, or some default in the sheriff or under-sheriff: As if the under-sheriff is attorney in the cause, and returns the jury, it is good cause of challenge to the array. *Baylis v. Lucas*, Cowp. 112. Or if the sheriff be party to the suit, or interested therein, or the like. Also, though there be no personal objection against the sheriff, yet if he arrays the pannel at the nomination, or under the direction of either party, this is good cause of challenge to the array. But challenges to the array seldom happen; because, 1st, The same reasons, generally speaking, that are sufficient to quash the array, would be good grounds at the time of awarding the *venire* to direct it to the coroners or elisors, as before-mentioned, page 433. upon a proper suggestion being made on the record, as in Appendix N. And 2dly, Because such reasons as would quash the array, would also be good grounds for a motion for a new trial. Cowp. 112.

Challenge to the
poll, what.
Grounds there-
of.

1st, Propter
honoris respectum.
2d, Propter
defectum.

Challenges to the polls (in *capita*) are exceptions to particular jurors. The ground of such challenges are reduced, by Lord Coke, to four. 1st, *Propter honorem respectum*: As if a lord of parliament be impannelled on a jury, he may be challenged by either party, or may challenge himself. 2d, *Propter defectum*: As if a jurymen be an alien born, or a slave, or bondman, or a minor, or, which is the principal deficiency, has not a sufficient estate * to qualify him to be a juror.

* By 4 & 5 W. & M. c. 24. s. 15. all jurors (except strangers upon trials per medietatem lingue) who are to be returned for trials of issues in any of the superior

a juror. 3d, *Propter delictum*: As if he has been guilty of any crime or misdemeanor that affects his credit and renders him infamous; as for a conviction of treason, felony, perjury, or conspiracy; or if he hath received judgment of pillory, or been branded or whipped; or if he be outlawed or excommunicated. 4th, *Propter affectum*; which, as it is the most general cause of challenge, I mention it last. This may be either a *principal* challenge, or to the favour. A principal challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: As that a juror is of kin to either party; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: All these are principal causes of challenge, which, if true, cannot be over-ruled; for jurors must be *omni exceptione majores*. Challenges to the favour are where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance, and the like, the validity of which must be left to the determination of triors, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be sworn, and then he and the two others shall try the next; and when another is found indifferent and sworn, the two triors shall be superfeded, and the two first sworn on the jury shall try the rest.

3d, Propter delictum.

4th, Propter affectum.

Principal challenge.

Challenge to the favour.

A juror may himself be examined on oath of *voir dire veritatem dicere*, with regard to such causes of challenge as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. 3 Blac. Com. 363, 364. See also Burr. 1856.

Of examining a challenged juror on the voir dire.

But this practice, of assigning particular reasons for challenges, and of the same being canvassed by triors, as above-

How this practice now disused;

superior courts, or general quarter sessions, must have in their own name, or in trust for them within the same county, 10l. by the year at least, above re-prizes of freehold or copyhold lands or tenements, or of ancient demesne, or in rents, or in all or any of them, in fee-simple, fee-tail, or for the life of themselves or some other person; and in Wales 6l.

But tales men only 5l. Sec. 18.

By 3 G. 2. c. 16. qualification extended to persons having estates in possession, in land in their own right, of the yearly value of 20l. and upwards, above the reserved rent, the same being held by lease for five hundred years, or for ninety-nine years, determinable on lives.

since 3 G. 2.
c. 25.

Of the tales de
circumstanti-
bus.

mentioned, is become in a great measure obsolete, since the stat. 3 Geo. 2. c. 25. which directs the mode of returning jurors in all common causes; for as, by the provision of that statute, there are generally a sufficient number of jurymen attending, the clerk at *nisi prius* or associate will, upon an intimation from either party, refrain from calling any person objected to without any reason being assigned.

If, however, by means of challenges or excuses, or non-attendance of the jurors, a sufficient number should not appear at the trial, either party may pray a *tales*; which is a supply of *such* men as are summoned upon the first pannel, in order to make up the deficiency. This was formerly done by a writ of *decem tales*, *octo tales*, and the like, directed to the sheriff, returnable at an early day, when the cause was again called on. But by stat. 35 H. 8. c. 6. and other subsequent statutes, the judge is empowered to award a *tales de circumstantibus*. This, however, is in a great measure rendered useless, by the stat. of 3 G. 2. c. 25.; for as there are always a sufficient number of common jurymen returned, a *tales de circumstantibus* is not wanted in common causes. And if a *tales* is prayed in special jury causes, which is generally done, for it is very rare that twelve special jurymen attend, they are taken from among those who attend on the common jury. In such cases, however, they are deemed *tales de circumstantibus*, (and not improperly, though perhaps not strictly so, according to the original construction of the term,) and are afterwards so recorded in the *posse*.

Upon all issues prosecuted by the king's officer, as in cases of information and the like, a warrant for the *tales* must be signed by the king's attorney-general, and if no such warrant procured, the cause must go off *pro defectu juratorum*. It must be signed by the attorney-general, though tried in a county palatine. *Rex v. Lambe*, Burr. 2171.

Of the mode of
returning a
common jury,

according to
3 G. 2. c. 25.

As we have already shewn how a special jury is struck and returned, I shall just briefly point out the mode of returning common juries, which will render what has been said more clear and comprehensible.

A common jury is one returned by the sheriff, according to the directions of the stat. 3 Geo. 2. c. 25. which appoints, that the sheriff or officer shall not return a separate pannel for every separate cause, as formerly, but one and the same pannel for every cause to be tried at the same assizes, containing not less than forty-eight, nor more than seventy-two, jurors; and that their names, being written on tickets, shall be put into a box or glass, and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless

absent,

absent, challenged, or excused, or unless a previous view of the messuages, lands, or place in question shall have been thought necessary by the court; in which case, six or more of the jurors returned, to be agreed on by the parties, or named by a judge, or other proper officer of the court, shall be appointed by special writ of *habens corpora* or *distringas*; to have the matters in question shewn to them by two persons named in the writ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest, previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors, when returned. 3 Blac. Com. 358.

How, if there has been a view.

All the names of the jurors must be drawn out of the box; and if another person, whose name is not in the box, answers to a name called, and by personating another jurymen is sworn, the verdict will be set aside, as being a verdict only of eleven; for it is not a matter of challenge, nor is the defect cured by stat. 32 Hen. 8. *Norman v. Beaumont*, Bar. 453. *Russel v. Ball*, lb. 455.

If one jurymen personates another, verdict will be set aside.

Such is the mode of obtaining a proper unexceptionable jury for the trial of the cause; and whenever twelve of the persons impannelled and not objected to, appear, or the number be made up by tales men, they are then sworn well and truly to try the issue joined between the parties, and a true verdict to give according to the evidence. Hence they are called a jury, *jurata*, and jurors, *juratores*. See 3 Blac. Com. c. 23.

SECTION IV.

Of nonsuiting at the Trial.

When the jury are sworn, it becomes the duty of the plaintiff's counsel to enter upon his case; and it is incumbent upon him not only to prove by evidence *every fact* that is necessary to support it, but the facts, when proved, must be such as in point of law are sufficient to maintain an action: for if he fails in either of these respects, he will, under the direction of the judge, be nonsuited; nor will the defendant have occasion to go into the merits of his defence; whereupon the crier is ordered to call the plaintiff; and if neither he, nor any one for him, appears, he is then said to be nonsuited; the jurors are discharged; the action is at an end; and the defendant recovers his costs.

Of a nonsuit at the trial, what.

For

For by the old law no verdict could be given in the absence of the parties; and, therefore, when the jury returned to the bar to deliver their verdict, the plaintiff was bound to appear in court in order to answer the amercement, to which he was formerly liable if he failed in his suit. And though this amercement is disused, yet the form in the pleadings still continues the same, and his appearance in court in person, or by attorney, is as necessary now as formerly, before the jury can deliver their verdict.

But the plaintiff, if he pleases, may suffer a nonsuit at any time before the verdict be given, though after the full discussion of the cause, and the summing up of the judge in defendant's favour.

When therefore a plaintiff, or his counsel, imagines that sufficient evidence has not been given to maintain the issue on his part, and apprehending the verdict likely to go against him, it is usual for him to be voluntarily nonsuited by withdrawing himself; and he has his advantage in this, rather than suffer a verdict to be given against him upon the merits; for after a judgment of nonsuit, he may bring another action upon the very self same ground of complaint; which he cannot do after a verdict against him upon the merits.

But if once he suffers the jury to pronounce their verdict, he cannot prevent its being recorded and elect to be nonsuited.

In an issue out of Chancery, on a motion for a new trial, because the defendant had produced evidence by surprise, which the plaintiff, if prepared, could have answered; one main reason for denying the motion was, that the plaintiff suffered a verdict to be given when he might have been nonsuited; which I mention as a caution in cases of the like kind. Bull. Ni. Pri. 326. *Richards v. Syms*.

At *nisi prius* the cause was called and jury sworn; but counsel, attornies, parties, or witnesses appeared on either side. *Per Pratt, C. J.* the only way is, to discharge the jury; for no body has a right to demand the plaintiff but the defendant; and, therefore defendant not demanding him, I cannot order him to be called. *Arnold v. Johnson*, Str. 267.

Nor can a plaintiff be nonsuited at the trial against his consent. But if he insists upon his right to appear when called, the judge must direct the jury to find a verdict against him. *Watkins v. Tower*, 2 D. & E. 280.

After a jury is sworn and charged with the evidence, they cannot be adjourned; nor can the cause, even upon the petition and consent of both parties, be adjourned by the judge

Advantages in certain cases of a nonsuit;

must be before verdict pronounced.

No nonsuit if neither side appear.

Cause cannot be adjourned after jury sworn.

judge at *nisi prius* for difficulty into bank. *Dawson v. Howard* Ld. Raym. 129.

If plaintiff, upon defendant's moving to change the venue, undertakes to give material evidence in the county of A. in order to retain his venue where he lays it, and afterwards at the trial gives no material evidence in that county, but fails therein, he must be nonsuited; and if the jury should give a verdict for him, the same will be set aside, and a nonsuit entered. *Santler v. Heard*, C. P. 2 Blac. Rep. 1031.

Where there is judgment by default against one defendant in a joint action, the other cannot nonsuit the plaintiff at the trial on issue joined by him; nor if the plaintiff neglect to proceed to trial, can he obtain judgment, as in case of a nonsuit. *Weller v. Goyton*, Burr. 358.

In trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is matter for the jury whether the trespass proved be the same as that confessed; but the plaintiff cannot be nonsuited. *Harris v. Batterley*, Cowp. 483.

In all causes where both parties are actors, as prohibition, replevin, &c. if defendant carries down record by *proviso*, and the plaintiff does not appear, on whom the proof of the issue lies, the cause cannot be tried on defendant's record and a verdict entered, but plaintiff should be called and nonsuited. If a verdict be obtained, it will afterwards be set aside; and it will then be too late to enter a nonsuit, for it cannot be recorded in bank, but must be done by the judge at *nisi prius*. *Gardner v. Davis*, B. R. 1 Wils. 300. *Hicks v. Young*, C. B. Bar. 458.

After a nonsuit, the court will stay proceedings in a second action between the same parties for the same cause, until the costs of the nonsuit are paid, notwithstanding plaintiff be a prisoner at the time of bringing the second action, and sue in *forma pauperis*. *Weston v. Wuthers*, 2 D. & E. 511. *Moulton qui tam v. Bingham*, Ib. n. *Baldwin v. Richards*, Ib. n.

Formerly it was held, that a nonsuit could not be set aside though occasioned by the mistake of the judge. *Hartly v. Atkinson*, Bar. 317. *Love v. Day*, Bar. 311.

But in the case of *Sadler v. Evans*, Burr. 1986. the court were unanimous both upon principles and authorities, that where a judge at *nisi prius* nonsuits the plaintiff and is mistaken, the court, upon motion, may set aside the nonsuit.

And this is now the settled practice in both courts.

VOL. I.-

H h

The

In what cases plaintiff will be nonsuited;

if on undertaking to retain venue, he does not give material evidence agreeable thereto.

No nonsuit in joint action, where one defendant has let judgment go by default;

plaintiff need only give evidence to affect the rest.

Of the nonsuit where record carried down by proviso.

After nonsuit, costs must be paid before second action proceeded in.

Formerly nonsuit could not be set aside.

Settled practice now otherwise.

In what case
court will not
set it aside.

The court will not set aside a nonsuit voluntarily suffered by plaintiff, and give him leave to reply *de novo*, so as to put the issue on another footing than he before had done. *Hutchinson v. Brice*, Burr. 2692.

SECTION V.

Of References at *Nisi Prius*.

How reference
made, and what
done in conse-
quence thereof.

It often happens at the time of trial, that causes are referred by consent to arbitration; for which purpose an order of *nisi prius* is drawn up, by the associate, if at the assizes, and by clerk of *nisi prius*, if at the sittings,

Witnesses to
be sworn.

The respective attornies should set down the names of the witnesses proposed to be examined on the reference, and deliver the same to the crier, who will swear them at the bar of the court; for which he is paid 2s. each witness. If the witnesses are not sworn in court, they must attend a judge to be sworn.

How plaintiff's
attorney to pro-
ceed.

When plaintiff's attorney wishes to proceed on the reference, let him procure the order of *nisi prius* from the proper officer as above, and get the arbitrator to appoint a time and place for the parties to meet, (which should be in writing,) then annex a true copy thereof to a copy of the order of *nisi prius*, and serve both on the defendant's attorney (as may be afterwards necessary to make affidavit of such service); the attornies on both sides should deliver to the arbitrator short briefs of their client's case, with the names of the witnesses sworn to be examined, and all necessary papers, &c.

How to enlarge
time by con-
sent.

The arbitrator may adjourn from time to time, so as he makes his award within the time limited in the order.

If he does not make his award in the time, the time may be enlarged by consent, but not without; and in order to obtain such an enlargement, it is first necessary to make the order of *nisi prius* a rule of court, which is a motion of course; after which, briefs must be given to counsel, the one to move, and the other to consent to such enlargement; clerk of rules will then draw up rule, for which pay 6s.; plaintiff's attorney must serve copy thereof on defendant's attorney, a new appointment fixed by the arbitrator, and a service thereof made as above.

When the award is made, the arbitrator's attorney should give notice to the attorney on each side, that the award is ready for delivery, and that the respective parties may have their part on paying for the same.

If

If the party in whose favour the award is made, accept his part thereof, and the other against whom it is given, refuses to accept his, a tender thereof should be made; and upon affidavit of such tender and refusal, a rule may be obtained to make the order of *nisi prius* a rule of court, and a copy thereof served on the refractory party. If this rule be disobeyed, upon affidavit of personal service of a copy thereof and disobedience thereto, an attachment will be granted.

If the party does accept the award, but refuses to obey it, make the order of *nisi prius* a rule of court; make a copy of such rule and of the award, serve them on the other party, and at the same time demand the money awarded; which, if refused, make affidavit of the facts, and move for an attachment.

To the party in whose favour the award is made, costs are of course given as to the suit, provided the costs were to abide the event; therefore get an appointment from the master on the rule, which serve on the other attorney, and get same taxed accordingly; annex a copy of the master's allocatur to the copy of the rule and the award, serve the copies personally on the other party, and at the same time shew the original order and award; if not complied with, move as above for attachment or affidavit of the service of the rule and allocatur for costs and the demand of the money; and also an affidavit of the due execution of the award made by one of the witnesses.

The rule for the attachment is carried to the crown-office in the Temple, and the attachment there bespoke; when obtained, a warrant thereon is got from the office of the sheriff of the county wherein the party to be attached resides, and executed accordingly.

Under the general term *costs* in a reference by order of *nisi prius*, only the costs of the *suit* are included, and not the costs of the *reference*. So that the arbitrator has no power to give the costs of the award, unless under a special provision inserted in the order of *nisi prius*; but both parties must pay the latter costs between them, and this in both courts. *Bradley v. Tunstow*, 1 P. & B. 35.

If bail has been given in the cause proposed to be referred, it is the safest way for plaintiff to take a verdict for any certain sum, subject to the reference; for otherwise the bail will be discharged. This, therefore, is frequently done; and the plaintiff, after the award is made in his favour, has the election to proceed either to execution upon the verdict, or by attachment upon the award. But as in the latter case he cannot sue out an attachment, so in the former he cannot

Of references at nisi prius, where verdict is taken for security.

enter up judgment without leave of the court; the necessary steps, therefore, to ground such application are, in both cases, nearly the same.

After the award is made, let the costs be taxed and the rule and award copied, a service of copy thereof and a personal demand of the sum awarded, with the costs made; and upon affidavit of such service with the master's *allocatur* a copy of the award, and demand of the money, the court may be moved.

If plaintiff means to proceed on the verdict, he should give a rule for judgment in the usual way; he may then move the court, that the *possea* may be delivered to plaintiff, and that he may be at liberty to sign judgment and take out execution for the money awarded and costs; and that the master may tax the costs of that application. A rule *nisi* is granted, and if no cause shewn, made absolute upon affidavit of service in the usual way.

Upon this rule the marshal or associate will deliver the *possea*; which get stamped; then sign judgment with the master, who will tax the costs, and proceed to execution for the sum awarded, and costs, but no more.

If the award be for a less sum than the verdict, the plaintiff may levy the equitable costs out of the excess. Imp. B. R. 690.

At the election of plaintiff, to proceed on verdict or award.

If a rule be made at *nisi prius* to refer a matter to the three foremen of the jury, and that the plaintiff shall have a verdict for his security, after the award made, the plaintiff may either enter up judgment on the verdict, or have an attachment for not obeying the rule of court, it being in his election which way he will execute the award; and this was affirmed to be the constant practice. Tourton and Gould (in the absence of the Chief Justice) doubted of it, because the verdict stood still on record. To which it was answered, there could not be a judgment entered on such verdict without leave of the court, and the attachment was granted. *Hall v. Mifer*, Salk. 84.

If he proceeds on verdict, there must still be verdict of due execution of award, and the like.

Verdict for plaintiff for security. Reference by rule to three of the jurors. Award in plaintiff's favour, rule obtained to shew cause why the *possea* should not be delivered to plaintiff, to take out execution for the money awarded. Objection by defendant, that no affidavit was produced of the due execution of the award, or of a demand of the money; which the court held to be as necessary as if the motion had been for an attachment; and the rule was discharged. *Read v Garnett*, Bar. 58.

9 & 10 W. 3. does not extend to awards made

The 9 & 10 W. 3. c. 15. s. 2. which limits the time of complaining against awards to the last day of the next term after

after the award made, extends not to such as are made in pursuance of a rule of *nisi prius*, but only where the submission is by obligation; and nothing is a ground within that statute for the court to set aside an award, but manifest corruption in the arbitrators: We will not unravel the matter, and examine into the justice and reasonableness of what is awarded. *Per Cur.* in *Anderson v. Coxeter*, Str. 301. So *Lucas and Wilson*, Burr. 701.

under references at nisi prius.

It has been settled of late years, that an attachment for non-performance of an award is only in the nature of a civil execution, and therefore the party cannot be apprehended thereon on a Sunday, though there is a case in 1 Atk. 58. to the contrary.

Attachment only a civil execution. Party not to be taken on Sunday.

So a person in custody upon such an attachment, is entitled to be discharged under the Lords' act. *The King v. Myers*, 1 D. & E. 266. Cowp. 136.

Party may be discharged on Lords' Act.

But see further on this head, tit. *Arbitration*, vol. II.

SECTION VI.

Of Bills of Exception, and Demurrers to Evidence.

Nothing can be more important to the ends of justice than that certain rules should be established and adhered to, with respect to the admissibility or inadmissibility of evidence upon the trial of a cause; but inasmuch as, from the nice and complicated nature of such rules, the best of judges may be sometimes liable to err, by rejecting, or allowing improperly, any particular species of testimony; the law has provided for the benefit of the subject a remedy in this respect, by enabling the injured party to bring the question in dispute before the same court, or some other tribunal, for their decision on the propriety or impropriety of the judge's admitting or rejecting such evidence; and this may be done according to the circumstances of the case, either by bill of exceptions, or by demurrer to evidence.

Use and meaning thereof.

If the judge at *nisi prius* either in his directions or decisions mis-states the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a bill of exceptions, stating the point wherein he is supposed to err: And this he is obliged to seal, by statute Westm. 2. 13 Edw. 1. c. 31. or if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: And if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return.

Bills of exceptions, what.

The bill of exceptions is no part of the record till after judgment. The cause proceeds, and judgment is given as if there was no bill of exceptions. It is carried into a court of error, and there annexed to the record; if it had been part of the record there would be no occasion to send for the judge to acknowledge his seal; when that is done it is for the first time annexed to the record. Being for the benefit of the party who tenders it, and remaining in his possession, it is in his breast to employ it or not. Regularly it ought to be tendered at the time of the trial, and sealed by the judge in court; and though the practice is to allow the counsel to tender it afterwards, and some expence may arise to the parties before it is settled, yet this is not in a regular course of proceeding upon which costs can be incurred. The court of error may allow costs thereon, but not the court below. *Gardner v. Baillie*, 1 P. & B. 32.

Demurrer to
evidence, what.

A bill of exceptions, therefore, is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. But a *demurrer to evidence* shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which, there arises a doubt in law; in which case, the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law, to maintain or overthrow the issue, which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. 3 Blac. Com. 372.

2. Whether the defendant can demur to the evidence after having paid money into court? *Jenkins v. Tucker*, 1 H. Bl. 90.

How fell into
disuse.

Such, indeed, formerly were the usual modes of redress; but of late years, since the extension of the discretionary power of the court in granting new trials, questions of misdirections of judges at *nisi prius*, and the like, have been brought before the court, and canvassed in the shape of motions for new trials; and bills of exceptions and demurrers to evidence are now very rarely resorted to.

For which reason, I shall here content myself with referring my reader, as well for further information on the subject, as also for the respective forms of a bill of exceptions and demurrer to evidence, to Buller's *Nisi Prius*, 313 to 320, and the following cases: *Money and others v. Leach*, Burr. 1692. *Symers and another v. Regem*, Cowp. 500. *Da-*

vies v. Pierce, 2 D. & E. 53. and *Gibson and Johnson v. Hunter*, 2 H. Bl. 198. where there is a modern precedent of a demurrer to evidence and joinder.

SECTION VII.

Of Verdicts and Cases reserved.

(A) Of General Verdicts.

(B) Of Special Verdicts.

(C) Of Cases reserved.

(A) Of General Verdicts.

(A)

A verdict (*vere dictum, quasi dictum veritatis*, Co. Lit. 226.) is the answer of a jury given to the court concerning the matter of fact, in any cause committed to their trial and examination. A verdict, what :

In ancient times, if the jury (in civil causes) were not unanimous in their opinion, the majority might give a verdict, and judgment was given *ex dicto majoris partis juratorum*; nay, jurors might even bring in a verdict upon their belief only. Reeve's Hist. 2. 268. Formerly given by majority of jurors ;

But, in the reign of Edward III. this practice was exploded; certainty and unanimity became requisite. It was held by the court, that a verdict from eleven jurors was no verdict at all; and, though a particular precedent of a former judge was urged, Thorpe, one of the justices, said, that it was no example for them to follow, for that judge had been greatly censured for it. And it was said by the Bench, that the justices ought to have carried the jurors about with them in carts till they were agreed. From this period, therefore, it has ever been held, that jurors must be unanimous in their verdict. Reeve's Hist. 3. 100. afterwards made necessary to be unanimous.

There are two kinds of verdicts, general and special, or, as it is sometimes called, a verdict *at large*. Two kinds of verdicts.

A general verdict is when the jury find generally for the plaintiff or defendant, without alleging any special matter, but merely affirming or negating the issues joined between the parties. General verdict, what.

As in an action upon promises, wherein defendant pleaded the general issue *non assumpsit*; the jury, by a general verdict, if they find for plaintiff, are supposed to say, That defendant did undertake and promise, &c. if for defendant, That he did not undertake and promise, and the like; always following the words of the several issues.

H h 4

Sometimes

Sometimes a general verdict is given for plaintiff upon some of the issues, and for defendant upon the other issues; in which case, the foreman of the jury mentions the issues, which they find for each respectively, and the verdict is still recorded in the words of the issues, affirming or negating them as they have been respectively found.

Of public and
privy verdicts.

A verdict may also be either public or privy. Public, if given in open court; privy, if given out of court before any of the judges; in which case, it must afterwards be confirmed in open court, and a jury may, if they think fit, vary from it, so that it is tantamount to no verdict. In criminal cases, a privy verdict cannot be given. 3 Blac. Com. 377.

N. B. When the judge adjourns to his own lodgings, and there receives the verdict, this is a public, not a privy verdict.

Verdicts, how
recorded.

Of the *possea*.

The verdict, when found, is to be indorsed on the record, which forms what is called the *possea*; of which hereafter. If the trial be at the sittings in London or Middlesex, the *possea* is immediately delivered to the party obtaining the verdict, who makes the proper indorsement; but, if tried at the assizes, the associate keeps the record, and indorses the *possea*, and afterwards delivers it to the party.

Much might be here said upon the effect and operation of general verdicts, in what cases they may be altered or amended; when they shall be deemed bad from the misbehaviour of the jurors, or of the parties; when inefficient in point of law, by being found on immaterial issues, or by not finding all that was in issue, or the like: But as the first of these points comes more immediately into consideration under the head of *possea*, and the other two under the heads of motions for new trials, and in arrest of judgment, I must refer the reader to those sections in the next chapter.

(B)

(B) Of Special Verdicts.

Special verdict,
what.

If there arise in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdicts attained, will find a special verdict, which is grounded on the stat. Westm. 2. 13 Edw. 1. c. 30. s. 2.; and herein they state the naked facts as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion, that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined at the court at Westminster,

minster, from whence the issue came to be tried; if neither party be dissatisfied with the judgment of the court, they may carry it up to the dernier resort, the House of Lords, by writ of error.

A special verdict should be drawn with as much conciseness as the nature of the case will admit.

In finding special verdicts where the points are single and not complicated, and no special conclusion, the counsel (if required) do subscribe the points in question, and agree to amend the omission of mistakes in the mesne conveyance according to the truth, to bring the point in question to judgment.

The unnecessary finding of deeds in *hæc verba*, where the question rests not upon them, but are only derivation of title, should be spared, and found shortly according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. R. M. 1654. f. 20.

In B. R.

When a special verdict is found, it is drawn and settled by the counsel on each side from the notes taken at the trial, who respectively sign the same; plaintiff's attorney having first got his counsel to peruse and sign it, and then given it to the defendant's attorney for the like purpose; it is then left with clerk of nisi prius, or associate, who makes out copies for each party; the roll is then completed by the verdict being entered thereon, and docketed, and filed; a concilium is moved for, a rule got thereon from clerk of rules, and carried to the clerk of papers, who enters the cause for argument, and a copy of rule is served on defendant's attorney.

The cause ought strictly to be set down within the first four days of the term, but leave of the court may be obtained for that purpose afterwards, for they are not so rigid as to the time of setting down special verdicts as they are with respect to special cases. Books must be delivered to the judges, containing the whole record and special verdict, two days before argument:

In C. B.

When a special verdict is found, it is settled and signed by two serjeants, and left with the associate, who makes out copies for each party; plaintiff's attorney then carries it to prothonotary's; the clerk will make out six copies of the proceedings, with the special verdict, four for the judges and two for the serjeants; three of these copies are for defendant's attorney, who must pay for same; if he refuses, plaintiff's attorney may deliver the four to the judges, and defendant's counsel will not be heard on argument. Let it then be entered on the roll; move for concilium; carry roll to secondary's, and let it be in court; secondary will mark roll, and draw up rule for concilium; and will also set the cause down for argument; copy of rule must be served on the attorney of the other side.

When judgment given, draw up rule for judgment, and tax costs as in other cases.

The books must be delivered to judges one week at least before the day of argument, two by plaintiff's attorney to the two senior judges, and

How to proceed to get special verdict argued.

ment : Plaintiff's attorney delivers two (to the Chief and senior judge) and defendant's attorney, two to the other two judges. The proceedings as to getting the special verdict argued, being the same as on demurrer.

Be the verdict in whose favour it may, the rule of court is drawn up and costs taxed immediately, without a rule being given for judgment, and execution may issue thereon. But the other party may have a rule to be present at the taxing of costs, as in other cases. *Imp. B. R. 385.*

and two by defendant's attorney to the other two judges.

But if either attorney neglects to deliver books on his part, the other may deliver them three days before argument, and shall be paid for same by the opposite attorney on demand, or he shall be allowed these in his costs; or if no costs taxed, he may compel payment by attachment. *Rule East. 27 Car. 2.*

The rule formerly extended to demurrers also; but a subsequent rule of 6 G. 2. Reg. 3. has altered the time of delivering the demurrer books to two days before argument; but this old rule of Car. 2. still holds good as to special verdicts; which makes a difference in the practice of the two courts in this respect.

(C)

Cases reserved introduced instead of special verdicts.

(C) Of Cases reserved.

Formerly when any serious legal doubts arose at the trial, special verdicts were the only mode in which the point could be formally brought before the court for their determination; but in later times a more easy and expeditious method is adopted; instead of the jury finding a special verdict, and the matter at large being set forth upon the record, they give a verdict generally for the plaintiff, subject, nevertheless, to the opinion of the court above, on a special case stated under the direction of the judge and the advocates on both sides.

Special case no part of the record.

This does not constitute a part of the record, and is attended with less expence than the finding of a special verdict. On the other hand, it has this disadvantage, that as nothing appears on the record but the general verdict, it cannot, like the latter be removed by writ of error, so as finally to await the determination of the lords in parliament. If, therefore, the matter in question be of such moment and nicety as to induce either party to think it may be advisable to carry it to the *dernier resort*, in case the judgment of the court should be unfavourable to him, he must not consent to take a case, but must bring it on in the shape of a special verdict.

By whom pos- tea kept till cause determined.

The *pos tea*, when a case is reserved, remains in the hands of the clerk of *nisi prius*, or associate, till the matter is determined, and a verdict is then entered accordingly.

The

The attorneys get the special case settled and signed by the counsel or serjeants, it is then carried to the associate, who makes out copies for the parties; a concilium is moved for; the rule served on the attorney of the other side, and proceed to set case down, to deliver books, and to go on to argument in same way as in special verdicts.

How to proceed to get case argued.

All special cases must now be put in the paper for argument within the first four days of the term after the trial, and the courts have of late grown strict in this respect. Special verdicts may be set down afterwards.

Before the *concilium* is moved for, the case ought to be accurately settled as to dates and every other particular, so as not to trouble the court with any further application after it is set down in the paper. Formerly, indeed, the court themselves used to order demurrers or cases to be set down for argument according as upon inspection they found them deserving; but of late years they have trusted this to the discretion of counsel, upon whose signature only *conciliums* are granted of course.

In a case for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of facts only. *Palmer v. Johnson*, 2 Wils. 163.

When a case is reserved at *nisi prius* for the opinion of the court, which is a practice introduced in lieu of a special verdict, the verdict ought always to be for the plaintiff; and the rule of *nisi prius* ought to be to the following effect: That if the court should be of opinion for the defendant, that then judgment of nonsuit should be entered, otherwise the defendant could have no remedy in case of the plaintiff's death. *Moyse v. Cockfedge*, Bar. 460.

SECTION VIII.

Of Certificates for Costs.

Of the several statutes respecting costs, there are some of which the party can only take advantage by getting the judge to certify at the back of the record at the time of trial. It is, therefore, highly necessary to know in what cases this application should be made, and to be cautious not to lose the opportunity, which only offers itself at this stage of the suit.

Some certificate must be obtained at the trial.

And first, in the common case of special juries, the charges thereof will not be allowed, unless the judge certifies at the trial; for by 24 G. 2. the party moving for the special jury shall pay the whole expence, and not be allowed it, unless the judge before whom the cause is tried, *shall, immediately after trial, certify in open court, under his hand,*
upon

Thus for the costs of special jury.

So in all cases of assault and battery, where costs under 40 s. certificate that battery was proved, or freehold came into question, must be at the trial. Stat. 22 & 23 Car. 2.

upon the back of the record, that the same was a cause proper to be tried by a special jury.

So in all cases of assaults and battery, where the damages are under 40 s. the plaintiff, in order to get his full costs, must at the trial get the judge to certify, that an assault *and battery* was proved, or that the freehold or title to the land was chiefly in question; for the words of the statute 22 & 23 Car. 2. c. 9. are, "That in all actions of trespass, assault, and battery, and other personal actions wherein the judge at the trial of the cause shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find damages under the value of forty shillings, shall not recover more costs than the damages so found shall amount unto."

No certificate is necessary where the defendant admits a battery by justifying it, but only where it does not appear on the record that a battery was committed. *Smith v. Edge*, 6 D. & E. 564. *Rededge v. Palmer*, 2 H. Bl. 2.

In an action for mesne profits, if the judge does not certify, and damages under 40 s. costs not allowed. *Doe v. Davis*, 6 D. & E. 594.

So certificates that trespass was wilful. 8 & 9 W. 3. c. 11.

So a certificate according to the stat. 8 & 9 W. 3. c. 11. that the trespass was wilful and malicious, in order to give plaintiff his full costs where damages are found under 40 s., must be made in court, or it is void. And the judge has no discretion, but is bound to certify where it appears that the trespass, however trifling, was committed after notice. *Reynolds v. Edwards*, 6 D. & E. 11.

So for double costs in actions against justices, &c. where verdict is for them.

Again, in all actions brought against justices, mayors, churchwardens, parish officers, constables, &c. where, if a verdict pass for them, or plaintiff be nonsuited, double costs are given, by the statutes 7 Jac. 1. c. 5. & 21 Jac. 1. c. 12. in such case, the judge should certify at the trial that they were acting in the execution of their office, or make an allowance of double costs upon the record.

So where verdict is against them.

In like manner, in actions against justices, where, by statute 24 G. 2. c. 44. plaintiff is entitled to double costs, if a verdict pass for him, and the judges certify, that the injury was wilfully and maliciously committed, the judge should certify to that effect at the trial in open court, on the back of the record.

Where not necessary.

But where there is a special verdict, and it appears by the facts found, that defendant was acting as justice, &c. no certificate is necessary. *Rann v. Pickins*, Do. 308.

But there are some statutes respecting costs, where a certificate is necessary, but need not be obtained till after the trial of the cause.

Such is the case with respect to the certificate upon the 43 Eliz. c. 6. which enacts, "That if upon any action personal, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judge, that the debt or damages to be recovered be under 40*s.* and so signified and set down by him, the plaintiff shall have no more costs than damages."

It has been held, that this certificate may be obtained after the trial. *Holland v. Gore*, Say. on Costs, 18.

This statute extends to all personal actions not particularly excepted; even to an action of trespass *vi et armis* for beating plaintiff's dog. *Dand v. Sexton*, 3 D. & E. 37.

So a certificate, according to the 4 & 5 Anne, c. 16. s. 6. may be granted after the trial, the words being, "That if a verdict shall be found upon any issue in the said cause, for plaintiff or demandant, (meaning where there are double pleas,) costs shall be given in like manner, unless the judge certify the defendant, or tenant, or plaintiff in replevin, had probable cause to plead such matter, which upon the said issue shall be found against him," &c.

In all the above cases, therefore, where the judge should certify at the trial, it is of importance to obtain such certificate, as it will afterwards be too late, and it cannot be cured by any motion in court, grounded on any affidavit, praying leave to enter a suggestion on the record. *Grindley v. Holloway*, Do. 307.

What certificates for costs need not be till after trial.

Those under 43 Eliz. c. 6.

To what actions that statute extends.

So certificates under 4 & 5 Anne, of probable cause, to plead certain pleas.

Consequence of neglecting to get certificate at trial, when statute requires it.

C H A P. XI.

Of Proceedings from Trial to Execution.

SEC. 1. *Of the Postea and Rule for Judgment.*SEC. 2. *Of new Trials.*SEC. 3. *Of arresting the Judgment.*SEC. 4. *Of taxing Costs, and signing final Judgment.*SEC. 5. *Of docketing Entries and Judgments.*

SECTION I.

Of the Postea and Rule for Judgment.

If special verdict, how to proceed has been shewn ante, sect. 7. ch. 10.

IF the verdict of the jury be a special verdict, or if there be a case reserved at the trial for the opinion of the court, we have already shewn how to proceed, in the seventh section of the last chapter; but if it be a general verdict, whether a special jury cause or not, the proceedings are as follow :

In B. R.

If it be a trial at the sittings, the associate, immediately after the verdict is given, makes a minute thereof, and delivers the postea, with distringas and pannel annexed, to the attorney, whose client has obtained the verdict, and he takes care to indorse the postea properly.

But if it be a trial at the assizes, the associate keeps the record till the next term, and in the interim, indorses the postea; for which a fee is paid at the trial.

The next thing to be done, is to take out a rule for judgment on the postea.

This may be given upon the return-day of the distringas, so if proceedings be by original, unless such return-day be a Sunday.

It is written on a slip of paper thus: A. v. B. rule for judgment on

In C. B.

In this court, the associate keeps the record, and indorses postea thereon, whether it be tried at assizes or at the sittings.

If the cause is tried in term, he will deliver same about the fifth day after term; if in vacation, it may be had in the first week of the subsequent term.

There is no rule given for judgment in this court, but you must wait the same time, four days exclusive, as in K. B. which is allowed the other side to move for a new trial, or in arrest of judgment. When the time is expired, the postea having been got from the associate, get it stamped at stamp-office with a double half-crown stamp; then carry it to the prothonotary, with papers in the cause, who will sign final judgment, and tax costs.

When judgment is signed, or costs

How to proceed to judgment on a general verdict.

As to the postea.
If at sittings.

If at assizes.

As to the rule for judgment.

on postea, or on inquiry (if it be after writ of inquiry). Dated,

T. S. plaintiff's attorney.

There is a four-day rule, exclusive of the day it is given. If Sunday or a dies non intervenes, it is no day, for four whole court-days are allowed.

Pending this rule, the other side may move for a new trial, or in arrest of judgment. If no such step is likely to be taken, let the attorney, who hath obtained the postea in the meantime, get it stamped with a double half-crown stamp at the stamp-office. Then carry same to clerk of common bails, at the King's Bench Office, who will mark the same deliberatur, as it is called, thus: Delivered of record, such a day and year, and sign his name; pay 6d. for entering.

N. B. If it be writ of inquiry, there is no postea or any thing stamped; but the double half-crown stamp is for the master to sign final judgment on.

When rule on postea or inquiry is out, carry same, with papers in cause, to the master in B. R. and prothonotary in C. B. who will sign final judgment and tax costs; for which see post, Sec. 4.

How to sign final judgment.

The rule for judgment ought not to be entered before the day in bank, and is not necessary, if the plaintiff be nonsuited; for, in that case, judgment may be entered immediately after the day in bank. N. on R. E. 5 G. 2.

Rule for judgment, when to be entered.

The postea is as a return of the judge before whom the cause is tried, of what was done therein; it is indorsed on the back of the nisi prius record, and is a continuation of the proceedings from the distringas; it has its name from the word postea, AFTERWARDS, being the first word of the subject-matter indorsed.

Postea, its purpose, and why so called.

The form of a postea, in a special jury cause where a tales was prayed, and which, by leaving out the tales part, may be converted into a postea on a common jury cause, is as follows:

Form of postea.

Afterwards, (that is to say,) on the day, and at the place within mentioned, before the right honourable Lloyd Lord Kenyon, the chief justice within written, Roger Kenyon, Esq. being associated unto him, according to the form of the statute in that case made and provided, came the within-

within-

within named *A. B.* by his attorney within contained, and the within named *C. D.* although solemnly required, came not, but made default; therefore let the jury, whereof mention is within made, be accepted of against him by his default; and the jurors of that jury being summoned, some of them, (that is to say,) [here name only the jurors that appear on the pannel,] and because the residue of the jurors of the same jury do not appear, therefore other persons, of those standing by the court by the sheriff of the county aforesaid, at the request of the said *A.* and by the command of the said chief justice, (if in London or Middlesex, if at the assizes, then by the command of the said justices,) are now newly set down, whose names are offed in the within written pannel, according to the form of the statute in that case made and provided, which said jurors, so newly set down, (that is to say,) *K. L. of, &c. haberdash,* (naming the rest of the tales men,) being required, came, who, together with the said other jurors, before impannelled and sworn to declare the truth of the within contents, being elected, tried, and sworn upon their oath, say, That the said *C. D.* did undertake and promise, in such manner and form as the said *A.* hath within complained against him; and they assess the damages of the said *A. B.* by reason of the not performing the promises and undertakings within written, besides his expences and costs laid out by him in this behalf, to 12*l.* and for those costs and charges to 40*s.* therefore, &c. *Imp. B. R.* 372.

How if judge dies after assizes and before term.

In case the judge of assize die after verdict, and before the day in bank, the clerk of assize returns the *postea* with a special entry. *Salk.* 671.

Of altering and amending the *Postea*.

Postea amended by judge's notes, in what cases.

If the associate makes a mistake by marking wrong damages on the *postea*, and the notes of the judge before whom the cause was tried are otherwise, the *postea*, on motion, may be amended by the judge's notes. *Newcomb v. Green*, 1 *Wils.* 33.

If verdict general, and not entered on all the issues.

So if there be a verdict for plaintiff generally, and he omits to enter up the verdict on all the issues, court, on motion, will amend the *postea*; and as it is a mere slip, such amendment may be after error brought. *Petrie v. Hunney*, 3 *D. & E.* 659.

If verdict entered generally when one count is bad, provided no evidence given on that count;

Again, if a general verdict and entire damages be entered when one of the counts is bad in law, and no evidence was given at the trial on such bad count, the *postea* may, on motion, be amended by the judge's notes. *Eddowes v. Hopkins*, *Do.* 376.

but not if evidence was given thereon.

I say where no evidence was given at the trial on such bad count; for this distinction was taken *per Buller*, Just. in same case. If there was only evidence at the trial upon such of the counts as are good and consistent, a general verdict might be altered from the judge's notes, and entered on those

those counts; but if there was any evidence which applied to the other bad or inconsistent counts, (as for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict,) there the *postea* cannot be amended, because it is impossible for the judge to say on which of the counts the jury have found the damages, or how they had apportioned them. In such case, therefore, the only remedy is, by awarding a *venire de novo*.

In the case of *Grant v. Affle*, Do. 730. Lord Mansfield said, he exceedingly lamented that ever so inconvenient and ill-founded a rule should have been established, as that where there are several counts and entire damages, and one count is bad and the others not, this should be fatal, upon the fictitious reasoning that the jury had assessed damages on all, though, in truth, they never thought of the different counts, but the verdict was so taken from the inadvertence of counsel in the hurry of *nisi prius*. And what makes this rule appear more absurd is, that it does not hold in the case of criminal prosecutions; for when there is a general verdict of *guilty* on an indictment consisting of several counts, if any one of them is good, that is held sufficient: but in civil cases the rule is now settled, and the court have gone as far as they can in allowing verdicts in such cases to be amended.

In further confirmation of this being the settled rule, is the case of *Holt v. Scholesfield*, 6 D. & E. 693. where Mr. J. Lawrence made the same distinction. There indeed they not only refused leave to amend, but would not grant a *venire de novo*, and judgment was arrested.

This distinction disapproved of by Lord Mansfield.

Postea not amended to increase damages;

The court will not amend the *postea* by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased sum, and that they conceived the verdict was calculated to give him such. Such things should be explained at the trial. *Jackson v. Williamson*, 2 D. & E. 281.

Nor will the court alter a verdict, unless it clearly appears on the face of it, that the alteration would be agreeable to the intention of the jury. Where, therefore, a jury bring in a verdict contrary to the notes or direction of a judge, the proper remedy is to move for a new trial. *Spencer v. Guter*, 1 H. Bl. 78.

nor verdict altered contrary to apparent intention of jury.

Where a verdict was given for a greater sum than the amount of the damages laid in the declaration, court will suffer amendment to be made by plaintiff, entering a *remittitur* of the *extra* sum; and this even after error is brought, on

If verdict be for greater sum than laid in declaration, remittitur may be entered.

At what time
such amend-
ment must be
moved for ;

whilst record is
in court.

Postea lost, and
a new one or-
dered.

payment of costs, (notwithstanding the case of *Sandiford v. Bean*, Hil. 13 Geo. 3.) 1 C. B. T. R. 643.

An amendment of the *postea* must be moved for before judgment; it cannot be amended afterwards on error being brought; though the court may even then award a *venire de novo*. *Grant v. Afle*, Do. 730.

As long as the record remains in court, amendments may be made; and though error is brought in the house of lords, the record still remains in B. R. only a transcript thereof being sent to the house of lords.

On a motion for a new trial, the *postea* was brought into court, and after a new trial had been denied, the *postea* could not be found; and the court, on debate, ordered a new one to be made out from the record above and the associates notes, *Dayrell v. Bridge*, Str. 1264.

SECTION II.

Of new Trials.

(A) Their Nature, Origin, and Utility.

(B) When and how to be moved for.

(C) In what Actions and Cases granted.

(D) Of the Costs in case of new Trial.

(E) How to proceed if new Trial granted.

(F) Of the motion for a *venire facias de novo*, and the Difference between them and Motions for new Trial.

(A) (A) Of the Nature, Origin, and Utility of New Trials.

The nature,
origin, and uti-
lity of new trials.

It has been observed, that four days from the return of the *distingas*, are allowed to move the court for a new trial, or in arrest of judgment.

No one, therefore, can have final judgment obtained against him by surprise.

We shall first treat of new trials, because a motion in arrest of judgment may be made after a new trial has been moved for and refused, but not *vice versa*.

Difference be-
tween the
grounds for new
trial and in ar-
rest of judg-
ment.

Causes of suspending the judgment by granting a new trial, are wholly *extrinsic*, arising from matter foreign to or *dehors* the record: whereas arrests of judgments arise upon *intrinsic* causes appearing upon the face of the record.

Trials

Trials by jury in civil causes, said Lord Mansfield, could not subsist now without a power somewhere to grant new trials. Utility of new trials.

If an erroneous judgment be given in point of law, there are many ways to review and set it right.

Where a court judges of fact upon depositions in writing, their sentence or decree may many ways be reviewed and set right.

But a general verdict can only be set right by a new trial; which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty that justice has not been done.

The writ of attain is now a mere found in every case; in many it does not pretend to be a remedy. Writ of attain out of use;

There are numberless cases of false verdicts without corruption or bad intention of the jurors; they may have heard too much of the matter before the trial, and imbibed prejudices without knowing it; the cause may be intricate; the examination may be so long as to distract and confound their attention. if not the inefficacy thereof.

Most general verdicts include legal consequences as well as propositions of fact: in drawing these consequences the jury may mistake, and infer directly contrary to law.

The parties may be surprised by a case falsely made at the trial, which they had no reason to expect; and therefore could not come prepared to answer.

If unjust verdicts obtained under these and a thousand like circumstances were to be conclusive for ever, the determination of civil property in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of re-considering the cause by a new trial; and it is done in a way very favourable to the parties for whom the wrong verdict is given; it is upon payment of costs. Whereas, in other cases where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance. New trials necessary to justice.

It is not true, "That no new trials were granted before 1655," as has been said in Style 466. How costs paid in such cases.

The reason why this matter cannot be traced further back is, "That the old report books do not give any accounts of determinations made by the court upon motions."

Indeed for a good while after this time, the granting of new trials was holden to a degree of strictness so intolerable, that it drove the parties into a court of equity, to have, in effect, a new trial at law of a mere legal question; because the verdict in justice, under all the circumstances, ought not When new trial first granted.

gradually more relaxed.

to conclude; and many bills have been retained upon this ground, and the question tried over again at law under the direction of a court of equity; and, therefore, of late years the courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases; and the rule laid down by Lord Parker in the case of the *Queen* against the *Corporation of Helsing*, H. 12 Ann. B. R. (see Lucas's Reports 202.) seems to be the best general rule that can be laid down on this subject, viz. "doing justice to the party;" or, in other words, "attaining the justice of the case."

Reasons for granting new trial.

The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances.

This power may be exercised at much less expence of time and money, therefore more beneficially for the subject, by the court of common law where the cause has been tried.

(B)

(B) When and how to move for new Trial.

At what time to be moved for;

If the party against whom a verdict is obtained on trial, or judgment on inquiry of damages, wishes for a new trial or inquisition, he must move for the same within the four days, and the motion must be made in the court, supported by an affidavit of facts.

and how.

It is a rule to shew cause; and though no notice thereof necessary in B. R. it is fair practice to give it, that the other side may be aware on what ground the motion is made. In C. B. notice of motion must be given.

How the four days reckoned;

In B. R. the four days for motions for new trials are inclusive; if the first day of term be the twenty-first, the 24th is the last day of moving. *Bunt v. Barlow*, Do. 171. Bar. 445.

not after the four days in C. B.

So in C. B. a motion for a new trial cannot be made after the four days expired, though before judgment entered, unless the foundation of the motion be some matter discovered after that time. *Willis v. Bennett*, Bar. 443.

What done on making the motion.

On motion for a new trial, the usual way is, to grant a rule to shew cause; and then the puisne judge of the court speaks to the judge who tried the cause, (if of another court,) and obtains a report from him of the trial, and also a signification of his sentiments on it; if the judge declares himself satisfied with the verdict, it hath been usual not to grant a new trial on account of its being a verdict against evidence; on the other hand, if he declares himself dissatisfied with the verdict, it is pretty much of course to grant it.

The

The court, under very particular circumstances, will permit a new trial to be moved for after the four days are expired. *Birt v. Barlow*, Do. 171.

In B. R. in very particular cases, new trial moved for after the four days.

So in criminal cases. *The King v. Gough*, Do. 797.

How, if court divided.

If on motion for a new trial the court are divided in opinion, no rule is made; the party who obtained the verdict is at liberty to sign final judgment. *Cartledge v. Eyles* Baronet, Bar. 442.

A new trial may be granted a second time, if the reasons for granting it are sufficient. *Per Cur.* in *Goodwin v. Gibbons*, one, &c. Burr. 2108. It must depend upon the circumstances of the case.

New trial granted second time,

But where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled by any rule of practice to a third trial. *Parker v. Ansel*, Blac. 963.

except where two contrary verdicts.

But if on a second trial the jury find the same verdict as the former jury did, and the court are of opinion the verdict is against law, they will grant a third trial. *Tindal v. Brown*, 1 D. & E. 167.

Third trial sometimes granted.

So, if they think the verdict clearly against evidence, a third trial will be granted. *Wilson v. Brough*, East. 24 G. 3. B. R.

If a new trial or inquisition be denied, the party may afterwards move on a similar affidavit to arrest the judgment; but if a motion in arrest of judgment be first made, and refused, you cannot afterwards move for a new trial. So it is of an inquiry; after motion in arrest of judgment, defendant cannot move for a new writ. *Salk. Rep.* 647.

After motion refused for new trial, motion in arrest of judgment may be made, but not vice versa.

Where, from any defect in the evidence or otherwise, it is contended on the trial that plaintiff should be non-suited, but the judge directs the contrary, and a verdict is found for him, care should be taken at the time to reserve a liberty for the defendant to enter a nonsuit, if the court above should be of opinion that the verdict cannot be sustained, otherwise they can only set aside the verdict, and grant a new trial. *Griffiths v. Brome*, 6 D. & E. 66.

(C) In what Actions and Cases granted.

(C)

In granting new trials, the court knows no limitations, (except in some particular cases,) but will either grant or refuse a new trial, as it will tend to the advancement of justice. 6 D. & E. 638.

It may be granted in misdemeanors, but not in offences of a higher class. *Ibid.*

No new trial allowed in a writ of right, except the verdict be flagrantly wrong. *Tyssen v. Clarke*, Blac. 941.

Not in writ of right.

In ejectment
seldom.

In ejectment, the courts will seldom grant a new trial where the verdict is for the defendant, because the plaintiff may bring a new ejectment; but, where it is for the plaintiff, a new trial is often granted, for the consequence of not granting a new trial is the alteration of the possession of the premises. *Goodtitle v. Clayton*, Burr. 2224. *Wright v. Littler*, Burr. 1244.

Not in penal
actions; except
in case of mis-
direction.

The courts never grant a new trial in penal actions. *Jervois v. Hall*, 1 Wils. 17. *Fonereau v. —*, 3 Wils. 59. and the case in 2 Keb. 226. held bad law, except upon the ground of misdirection by the judge. *Wilson v. Rastal*, 4 D. & E. 753.

Nor in actions
for malicious
prosecution.

Nor in an action for malicious prosecution, if verdict for defendant, though against evidence and judge's direction. *Norris v. Tyler*, Cowp. 37.

How in cases
of information;

A new trial may be granted in an information in nature of a *quo warranto*, although denied in the case of *The King v. Bennet*, 1 Str. 101. the court saying, that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding, and that there were several instances since the case in *Strange*, in which a new trial had been granted. *The King v. Francis*, 2 D. & E. 484.

in a joint
action where
one is ac-
quitted;

If in an action against two, one be acquitted and the other found guilty, that defendant can have no new trial. *Parker v. Godlin*, Str. 814.

But in the case of *The King v. Maybey* and others, where several defendants were tried at the same time for a misdemeanor, some of whom were acquitted and some convicted, the court granted a new trial as to those convicted, thinking the conviction improper. 6 D. & E. 638.

where money
is paid into
court;

No new trial granted in any action where defendant has paid money into court, that being an acknowledgment of the action. *Burrough v. Skinner*, Burr. 2639.

where by agree-
ment parties in
several actions
were to be
bound by ver-
dict in one;

Where, in several actions of a similar nature, it is agreed between the parties that they shall be bound by a verdict in one of the causes, it means such a verdict as the court thinks ought to stand as a final determination of the matter, and therefore does not prevent defendant from moving for a new trial, after a verdict in one of the causes for plaintiff. *Hodson v. Richardson*, Burr. 1477.

where there is
a bill of excep-
tion.

When there is a bill of exceptions, a new trial shall not be moved for on the point of law contained therein. *Fabrigat v. Moslyn*, Black. 929.

For the bill of exceptions is ordained by the legislature to be in nature of a writ of error. It would be unbecoming, therefore, in the court to stop it *in transitu*, unless the party will waive the bill of exceptions.

Value

Value and importance are not of themselves sufficient grounds for granting a new trial, unless there be also some doubt in the question, though they frequently weigh in obtaining a rule to shew cause why there should not be a new trial. *Vernon v. Hankey*, 2 D. & E. 113.

What grounds for new trial.

Value and importance, how for.

Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the courts have never granted new trials, notwithstanding the judge (before whom the cause was tried) hath been of opinion that the strength and weight of evidence was against the verdict.

Of verdicts contrary to evidence, or where only contradictory evidence.

1 Will. 22. Anon. *Swain v. Hall*, 3 Will. 47.

But the court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case, when they can see that plaintiff has obtained a verdict for such damages as he is entitled to in conscience and equity. *Slater v. Baker*, 2 Will. 362. *Wilkinson v. Payne*, 4 D. & E. 468. *Aylett v. Lowe*, Black. 1221.

If justice be not done to the parties;

For, though the ground of a verdict for the plaintiff be wrong, yet if no injustice be done to the defendant, or if the plaintiff can, by another form of action, recover as much, the court will not grant a new trial; but otherwise, where injustice is done him by it; and if it be not clear, the plaintiff may recover as much by another form of action. 4 Burr. 936.

It does not follow, by necessary consequence, that there must always be a new trial granted in all cases whatever, where the verdict is contrary to evidence; for it is possible that it may still be on the side of the real justice and equity of the case. *Ibid.*

If justice done, court will try to support verdict.

The court will not grant a new trial, even where the jury have found for the defendant, against evidence, if the plaintiff appears to have received no real injury, and the damages (if the verdict had been for the plaintiff) would have been but a mere trifle. *Burton v. Thompson*, Burr. 664.

For, after a verdict on the honest and just side of the cause, the court will support it, if possible, and not grant a new trial. *Goslin v. Wilcock*, C. B. 2 Will. 302.

Nor will the court ever grant a new trial, when they clearly see the merits have been fairly and fully tried. *Sampson v. Appleyard*, 3 Will. 273.

No new trial where merits fairly tried.

Although the weight of the evidence may be certified by the judge to have been against the verdict, yet a new trial will be denied, if the nature of the action, the value of the matter in dispute, and other circumstances of the case, war-

though the weight of evidence against the verdict.

rant such denial. For a new trial ought to be granted to attain real justice, but not to gratify litigious passions upon every point of *summum jus*. *Farwell v. Chaffey*, Burr. 53.

In which last case, a variety of cases are cited, in all of which the verdicts were against evidence, and the strict rule of law, or obtained through surprise: But the court would not give a second chance of success to a hard action, or an unconscionable defence.

No affidavits
admissible.

Nor will the court admit affidavits to explain evidence given at a trial, in order to found motions for a new trial thereon. *Hansen v. Parker*, 1 Wils. 257.

No new trial,
merely because
the verdict is a
hard one.

Where the verdict is neither against evidence nor law, though it be a hard one, no new trial will be granted. *Hanky v. Trotman*, Blac. 1.

In what cases
on affidavits of
jurymen.

The court will, under circumstances, grant new trials on the affidavits of jurymen, that the verdict was taken contrary to their meaning, but they are very cautious how they do this, as it may be of dangerous tendency.

Where, after a general verdict on both issues was given for defendant, eight of the jurymen stated on affidavit, that they meant their verdict to have been for plaintiff on one issue, and the court were satisfied that would have been right, though they were doubtful what to do, not liking to send the parties to a new trial; they at length desired the counsel to move why the verdict should not be amended and set right according to the truth of the finding, but no cause was shewn. *Cogan v. Edden*, Burr. 385.

Even in cri-
minal case.

New trial granted defendant in a criminal case upon the reports of the judge, and affidavits of the whole jury, that the verdict was taken contrary to their meaning, and to the judge's direction in point of law. *Rex v. Simmons*, 1 Wils. 329.

A jurymen's affidavit, with regard to his sentiments in point of law at the trial, ought not to be admitted, whatever may be the case of his affidavit, tending to rectify a mistake. *Rex v. Almon*, Burr. 2686. *Rex v. Thirkell*, Burr. 1696.

In what cases,
in order to
throw new light
on the question;

After a full trial by a competent jury, if no fresh light can be thrown in, a new trial shall not be granted, though the verdict might be contrary to the sense and meaning of the parties. *Camden v. Cowley*, Blac. 418.

or introduce
new evidence,
or the like;

There are cases where the court will grant new trials, notwithstanding there was evidence on both sides; as where all the light hath not been let in at the trial which might and ought to have been, as for want of all the subscribing witnesses to a release, set up by defendant, being called and examined. *Norris v. Freeman*, 3 Wils. 38.

The

The court will not grant a new trial to let the party into a defence of which he was apprised at the first trial. *Vernon v. Hankey*, 2 D. & E. 113.

Nor for want of evidence which he might then have produced. *Cooke v. Berry*, 1 Will. 98.

A new trial shall not be granted because the counsel thought it prudent to omit evidence which they had in their briefs, and might have offered in mitigation of damages; nor because another jury, in a cause nearly similar, gave a different verdict. *Spong v. Hog*, Blac. 802.

Not granted to give the defendant an opportunity of proving the illegality of a policy which was not illegal on the face of it, for he should have shewn it on the trial. *Gist v. Mason*, 1 T. R. 84.

But discovery of new evidence by the attorney of defendant executor (then absent from England), though in the actual custody of the attorney himself, yet not known by him so to be, is a ground for a new trial. *Broadhead v. Marshall*, Blac. 955.

A new trial will not be granted on account of a mistake by a witness in giving his evidence, *Huist v. Keldon*, Say. 27.; although by affidavit he confirms it to be a mistake; and had it not been made, the verdict would have been different.

or where witness made a mistake in his evidence;

But where a verdict is manifestly against equity, and obtained against defendant from inadvertence in not being prepared with evidence, court will grant new trial.

or verdict obtained by inadvertence;

A verdict upon a trial was for plaintiff, subject to the opinion of the court, upon this question, "Whether defendants, being sheriff's officers, (and who justified under a *fi. fa.*) ought upon the trial to have produced and proved a "copy of the judgment on which the *fi. fa.* issued?" The court were of opinion, that the action being by a stranger to the original suit, the judgment ought to have been proved, and a copy produced; but *aliter* if the action had been by the person against whom the *fi. fa.* issued; therefore the plaintiff's verdict stood. But in this case the court gave defendants leave to move for a new trial; which was granted, because plaintiff had brought this action under a fraudulent bill of sale. And Lord Mansfield said, the verdict arises from a slip and inadvertence, and is against law and justice; the plaintiff has no merits; the bill of sale was fraudulent; plaintiff's son (against whom *fi. fa.* issued) remained in possession; the recovery is manifestly contrary to reason and justice. *Martyn v. Podger* and others, Burr. 2631.

The *venire facias* was awarded by mistake returnable on the morrow of the Ascension instead of eight days of the Purification.

or where *venire facias* wrong awarded, or the like;

rication. The defendants, though their witnesses attended the assizes, made no defence at the trial, but confessed lease, entry, and ouster, and suffered plaintiff to take a verdict, relying on the mistake in awarding the venire, returnable at a day subsequent to the assize; till after which return and default made by the jurors, there could be no *nisi prius*. The jury process was made returnable at a proper day; and, on motion, the court held the variance material on the authority of two cases cited by the plaintiff's counsel. *Bastard & al.* against *Bartlett*, Trin. 3 G. 2. *Dale v. Holmes*, Mich. 4 G. 2. in B. R. verdict set aside on payment of costs. *Woden v. Saunders*, Bar. 460.

or for irregularity in not giving notice of trial;

Want of due notice is a proper ground for a motion for a new trial; but the defendant is precluded if he appear at the trial and make defence. *Salk.* 646.

or for variance between issue and record;

Though the issue delivered varied from the record of *nisi prius*, court refused a new trial. *Mather v. Brinker*, 2 Wil. 243.

or for unfairly keeping out of the way witnesses;

A material witness for defendant concealed himself in the plaintiff's house to avoid being served with a subpoena: by which the plaintiff obtained a verdict, but the court set it aside without costs, it being unreasonable for the plaintiff to carry the cause down to trial when she knew the defendant could not make a defence. *Montpeyson v. Randle*, Hil. 20 G. 2. Ball. Ni. Pri. 328.

or where sheriff admits improper evidence;

If the sheriff, on the execution of the writ of inquiry, admits improper evidence to be given whereby the damages are lessened, the court will set aside the inquisition, and give plaintiff leave to execute a new writ of inquiry. *Bar.* 448. *Tutton v. Andrews*.

or witnesses afterwards discovered incompetent;

An objection to the competency of witnesses discovered after a trial, is not a sufficient ground of itself for granting a new trial, but it may have some weight with the court where the party applying appears to have merits. *Turner and another v. Peart*, 1 D. & E. 717.

or where a system of perjury appears;

A new trial granted after a very strict scrutiny upon the ground, that the whole was a fiction supported by perjury, which defendant could not be prepared to answer; that since the trial many circumstances had been discovered to detect the iniquity, and to shew the subornation of the witnesses. *Fabrilus v. Cock*, Burr. 1772.

or any tricks used;

If a party obtain a verdict by any trick or unfair unconscionable advantage, court will grant a new trial, and even subject him to payment of costs. *Anderson v. George*, Burr. 353.

If the under-sheriff were attorney in the cause, and returned the pannel of jurors, new trial will be granted. *Boylis v. Lucas*, Cowp. 112.

or pannelled returned by improper officers;

A new trial was granted, because the foreman of the jury had declared, that the plaintiff should never have a verdict. Salk. 645. S. P. Sir G. Wynn v. Bishop of Bangor, Com. 601.

or partiality, avowed by jury;

A verdict was set aside because one person answered to another's name, and was sworn a juror. *Norman v. Beaumont*, Bar. 453. *Wrey v. Thorn*, Ibid. 454.

or any juror artfully personated;

A juror on the principal pannel was challenged, and afterwards sworn on the tales by a wrong name; and though no fault was found with the verdict, yet the court granted a new trial. *Parker v. Thornton*, Str. 629. Raym. 1410.

or sworn after being challenged;

Where the jury drew lots, verdict was set aside; though according to evidence and costs, abided the event. *Hall v. Cove*, Str. 642. *Philips v. Fowler*, Com. 525.

or where jury drew lots;

If it could be proved by any other than a jurymen, that a verdict was owing to chance, as by jurymen tossing up and the like, it would be set aside; but not so if the jurors voted how it ought to be, and seven were on one side and five of the other; because, in such case, nothing was determined by chance, the five jurors might ultimately be convinced by the seven: but if they only acquiesced in the finding of the verdict, that is sufficient; and they shall not afterwards be suffered to deny such acquiescence. *Lawrence v. Boswell*, Say. 100.

where verdict was the effect of chance, by jury tossing up, or the like;

Upon a motion to set aside a verdict upon the affidavit of two jurors, who swore, that the jury, being divided in their opinion, tossed up, and the plaintiff's friends won; agreeable to *Hall v. Cove*, Str. 642. Per Lord Mansfield, C. J. the court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source, such as somebody having seen the transaction through a window, or the like. Rule refused. *Vase v. Delaval*, 1 D. & E. 11.

how this must be shewn.

So a mere subsequent confession of a jurymen to the defendant's attorney, that the jury drew lots which six of them should determine the verdict, no ground for a new trial. *Aylett v. Jewel*, Blac. 1299.

The courts will grant a new trial for misdirection of the judge who tried the cause in point of evidence. *How v. Strode*, 2 Wil. 273. *Russel v. Palmer*, 2 Wil. 328.

New trial for misdirection of the judge;

After a nonsuit by order of the judge at *nisi prius*, improperly, the court granted a new trial without costs. 3 Wil. 146.

Buseall

Buseall v. Hogg. Ibid. 338. *Reckham v. Jessup*. *Rice v. Shute*, Burr. 2612.

but how far
court will exer-
cise their discre-
tion in this
respect.

An application for a new trial is an application to the discretion of the court, who ought to exercise that discretion in such a manner as will best answer the ends of justice.

Where a new trial therefore is moved for on the ground of a misdirection in point of law, if the court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law. *Edmondson v. Macbell*, 2 D. & E. 4.

New trial granted, judge refusing to let defendant *executrix* give evidence generally of payment of debts, &c. on a special *plene administravit*, setting out judgment debts, and more assets than sufficient for those debts being proved in her hands. *Smedly v. Hill*, Blac. 1105.

The court will grant a new trial in a penal action, on account of a mistake or misdirection of the judge. *Wilson v. Rafal*, 4 T. R. 753.

New trial for
excessive da-
mages when
granted.

There is no doubt but that the court has the power of taking the opinion of a second jury in any case where the damages are excessive; but all such questions depend on their own circumstances, on which the court will exercise their discretion. *Ducker v. Wood*, 1 D. & E. 277.

But they will be very cautious how they overthrow verdicts.

Inquisition
when set aside
on that account.

The court will not set aside any inquisition on a writ of inquiry for excessive damages, unless the case be gross and the damages enormous, if the action be for a tort or trespass. *Bruce v. Rawlins*, 3 Wil. 63.

Excessive damages were given on a writ of inquiry for a militia-man against his colonel, who had ordered him twenty lashes; but the court would not set it aside because the colonel had acted arbitrarily *malo animo*, and was well able to pay them. *Benson v. Sir Thomas Frederick*, Burr. 1846.

How in torts.

In personal *torts* the court will seldom grant a new trial for excessive damages. *Gilbert v. Burtenshaw*, Cowp. 230. *Fabrigas v. Mostyn*, Blac. 929.

But if the damages be outrageous they will. *Sharpe v. Brice*, Blac. 942.

Damages must
be flagrantly
excessive.

They must, however, be so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury; and outrageously disproportionate either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant.

The court will not grant a new trial in an action for *crim. con.* merely because the damages appear excessive. *Du-*
berly

berly v. Gunning, 4 T. R. 651. where the subject is fully discussed.

In an action for maliciously indicting plaintiff for perjury, 400*l.* damages not excessive. *Ibid.*

The plaintiff, a baronet and a member of parliament, recovered 10,000*l.* damages in an action on the case for a malicious prosecution, viz. indicting and trying him for felony at the Old Bailey. The court, on motion for a new trial on account of excessive damages, refused to grant it. *Sir Alexander Leith v. Pope*, Blac. 1327.

If a new trial be granted for excessive damages, and the same damages are given again, the court will never grant a third trial. *Chambers v. Robinson*, Str. 692.

If some damages given again, no third trial.

New trials refused in various actions for assaults and imprisonments, on the ground of excessive damages. *Leman v. Allen*, 2 Wil. 160. *Huckle v. Money*, Ibid. 205. *Beardmore v. Carrington*, Ibid. 244. *Ducker v. Wood*, 1 D. & E. 277.

So for debauching plaintiff's daughter. *Tullidge v. Wade*, 3 Wil. 18.

It is a general rule, that the court will not set aside a verdict in an action for a tort on account of the smallness of the damages. *Mauricet v. Brecknock*, Do. 509. *Barker v. Sir Wolston Dixie*, Str. 1051.

No new trial in tort for smallness of damages;

Unless it arises from a mistake in point of law of the sheriff, as in *Markham v. Middleton*, Str. 1259; or of the jury, as in *Woodford v. Eades*, Str. 425.

except in certain cases.

The principle is this, that the constitution has referred the decision of the question of damages to the jury; that the court ought not to set up their own judgment against that of the jury, especially in cases where the damages depend upon mere sentiment and opinion, and there is no rule by which they can be ascertained. It is different, indeed, where damages depend in any-wise upon calculation, for the court have then some medium by which they are enabled to correct any mistake of the jury. *Duberly v. Gunning*, 4 D. & E. 658.

General principle respecting new trials on the ground of damages.

(D) Of the Costs in case of new Trial.

(D)

A new trial is seldom granted but upon payment of costs; but this is in the discretion of the court.

Of the costs in cases of new trial.

Where a plaintiff refuses to be nonsuited contrary to the opinion of the judge, a new trial (if granted) shall be without costs. So where a plaintiff submits to a nonsuit in compliance with the erroneous opinion of a judge, the nonsuit shall be set aside without costs. *Pachin v. Pawley*, Blac. 670. *Buseall v. Hogg*, 3 Wil. 146. *Rackham v. Jessup*, Ibid. 338.

Where

Where a new trial has been granted, and nothing was said in the rule concerning the costs of the first, although the same party succeed on the second trial, he shall not have the costs of the first. *Mason v. Skurray*, Do. 430.

So where a case is reserved, and, from the insufficient statement of it, it is necessary to send it down to a second trial, and nothing is said respecting the costs, the party succeeding on such second trial is not entitled to the costs of the first. *Hankey and others v. Smith and others*, 3 D. & E. 507.

(E)

(E) How to proceed if new Trial granted.

How to proceed if new trial granted.

If verdict is set aside, and new trial granted, draw up rule, serve it, and pay costs immediately, if part of the rule; if not paid, the other side may move to enter up judgment and take out execution.

In B. R.

Nisi prius record need not be re-ingrossed if no *poltea* indorsed; but if it is, the officer (the signer of writs) will not pass the old record again.

If a new trial be granted, the return in the *jurata* must be altered the same as in case of remanents, and the record must be passed again, and a new venire and distringas sued out and returned, notice of trial given, and cause again set down; but no new entries are made or paid for.

In C. B.

Nisi prius record need not be ingrossed a-new; but *jurata* altered as to return. If tried in same term, record need not be re-sealed, nor any new venire or habeas corpus; but otherwise, if not tried in same term. Let a new placita be added to the record of the term in which the cause is to be tried.

How if plaintiff does not proceed to second trial.

If after a new trial granted, plaintiff does not proceed to try it again, defendant may move for judgment as in case of a nonsuit. *Fabrilius v. Cock*, Burr. 1771.

Same record, &c. must be carried to trial.

There was a verdict and new trial granted, and then the record of *nisi prius* was made up, with an appearance and plea of a different term from the former record, and verdict again for the plaintiff, which on motion was set aside, it not being the same issue that was directed to be tried again; and though a new trial was granted, yet it ought to be upon the old plea. *Harper v. Davy*, B. R. Raym. 510. Carth. 498.

No amendment suffered.

After a new trial granted, no amendment will be allowed in the record. *Parker v. Ansel*, Blac. 920.

Because the intent of new trials is to submit the same questions to the consideration of another jury, but by amendments the question would be varied.

Defendant,

Defendant, after a verdict against him, obtained a rule for a new trial, which, after argument, on a subsequent day was discharged. He then pleaded a plea *puis darrein* continuance entitled of the term generally, and the court refused to order a special memorandum of the day when it was filed under these circumstances. *Lovell v. Eastaff*, 3 T. R. 554.

Of pleading
puis darrein
continuance
afterwards.

(F) Of the *Venire Facias de novo*, and the Difference between that and Motion for new Trials.

(F)

Care should be taken not to confound motions for a *venire facias de novo* with motions for new trials; they agree, indeed, in some things, but they differ in many: They agree in this, that in both cases a *venire facias de novo* must be awarded, and that the court may or may not grant either of them; but they differ first in this, that a *venire facias de novo* is the *antient* proceeding of the common law; a new trial is only a *modern* invention. The first is as *antient* as the law, when attaints were in use; but motions for new trials are of later date. The judgment in attaint being very severe, and the punishment excessive hard, to avoid that severity it was thought better to proceed in a milder way; motions, therefore, for new trials were introduced. They likewise differ in this respect, that new trials are generally granted where a general verdict is found; a *venire facias de novo* upon a special verdict. But the most material difference between them is, that a *venire facias de novo* must be granted upon matter appearing *upon* the record; but a new trial may be granted upon things *out* of it. If the record be never so right, if the verdict appear to be contrary to the evidence given at the trial, or if it appear the judge has given wrong directions, a new trial will be granted. But it is otherwise as to a *venire facias de novo*, which can only be granted in one or other of these two cases: As, 1st, If it appear upon the face of the verdict, that the verdict is so imperfect that no judgment can be given upon it; 2dly, Where it appears that the jury ought to have found other facts differently: and it cannot be granted in any other case: 1 Wil. 55. *Witham v. Lewis*.

Of the difference
between
motions for new
trial, and *venire
facias de novo*.

Again:—A new trial is moved for on the part of defendant, upon the ground that justice has not been done him; a *venire de novo* is moved for on the part of plaintiff, in order to correct any error in the *postea* or verdict, when it cannot be done by amending the *postea* from the judge's notes, or the like. Such as if a general verdict be given in an action of slander, where some of the counts in the declaration are bad, and others good; there the *postea* cannot be amended and

entered only on the good counts, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them. The only remedy, therefore, in such case, is by awarding a *venire de novo*, which must be by moving the court for that purpose. *Eddowes v. Hopkins*, Do. 378.

But this was refused in *Holt v. Scholesfield*, 6 D. & E. 691.

So if final judgment has been obtained, after which it is too late to amend, in such a case, a *venire de novo* may be moved for. *Grant v. Afle*, Do. 722.

The effect of a *venire de novo* is sending the cause back to have damages assessed, only on that count on which, in point of law, he is entitled to recover. *Ibid*.

So where issue is joined on a matter of fact, pleaded in abatement and found for plaintiff, and jury omit assessing damages, a *venire de novo* shall be awarded; for where a man may have an attain, there no damages shall be assessed by the court, if they be not found by the jury. 4 Leon. 245. Godb. 207. And, as in this case, if outrageous damages had been given, an attain would lie, a *venire de novo* must go. *Eichorn v. La Maitne*, 2 Wil. 368.

In an action of debt, for a penalty on breach of articles of agreement, the jury ought, agreeable to the stat. of 8 & 9 W. 3. to assess the damages on the breach assigned; which, if not done, it is a defective verdict, as plaintiff cannot take judgment on the whole penalty, a *venire facias de novo* therefore will be awarded. *Drage v. Brand*, 2 Wil. 377.

Thus, in all cases of defective verdicts on the part of plaintiff, a *venire de novo* is moved for.

So, if a doubt arises from an ambiguous and unusual word in the verdict, the court will lean in favour of a *venire de novo*; and this the rather, because in favour of a defendant, though the verdict be full, the court may grant a new trial. A *venire de novo* awarded on the verdict, guilty of printing and publishing only. *Rex v. Woodfall*, Burr. 2669.

A court of error may award a *venire de novo*. *Grant v. Afle*, Do. 722.

SECTION III.

Of arresting the Judgment.

(A) When and how to move in Arrest of Judgment.

(B) Of the Nature of an Arrest of Judgment, and to what Courts and Cases it extends.

(C) Of

(C) Of the Grounds of arresting the Judgment.

(D) Of awarding a Repleader.

(A) When and how to move in arrest of Judgment. (A)

The defendant, within the four days, has liberty to move the court in arrest of judgment.

When and how to move in arrest of judgment. In B. R.

In B. R. a motion in arrest of judgment may be made at any time before judgment entered up, *Taylor v. Whitehead*, Do. 745. and even after a rule for a new trial has been discharged.

But in C. B. motion in arrest of judgment must be made before or upon the appearance-day of the *habeas corpora juratorum*. *Lyte v. Rivers*, Bar. 445.

In C. B.

And if it is moved on the last day of term, notice of the motion must be given, and an affidavit of service of notice, or court will not grant the usual rule to stay judgment. *Camp v. Gale*, Bar. 247.

If on last day of term:

But otherwise, in common cases no notice is necessary in either court, nor affidavit, to ground motion on; but a rule must be obtained to bring the *postea* or inquisition into court, which must be marked by clerk of papers in K. B. and secondary in C. B. It is a motion of course, and rule got at clerk of rules office in B. R. or secondary's in C. B.

what is to be done on such motion;

Or if inquisition be still in sheriff's hands, give him notice to produce it, and make affidavit of service of notice.

if on inquisition.

The purport of the rule of court is, that the entry of the final judgment be stayed until the court be moved on behalf of plaintiff, and shall otherwise order; notice of the rule is to be given to plaintiff, his attorney, or agent. Plaintiff afterwards gives notice, in usual way, to defendant's attorney when he means to move the court to discharge the rule. He serves copy of notice, and makes affidavit thereof.

Purport of the rule.

If afterwards the rule is discharged, he then draws up the rule, serves copy on defendant's attorney, and proceeds to tax costs.

But if judgment be arrested, defendant's attorney then draws up rule, and serves copy on plaintiff's attorney, and each party pays his own costs. *Cow.* 407.

Defendant had moved in arrest of judgment, and obtained the common rule, which is, that the entry of judgment be stayed till the court be moved on behalf of the plaintiff, and shall otherwise order; of which motion defendant had notice.

tice. Counsel for plaintiff admitted the objection in point of law, and prayed that an entry be made on the roll, as the adjudication of the court, that judgment be arrested, which was ordered. For till this entry be made, the plaintiff can neither bring error, nor maintain a new action, as the rule leaves the action pending pleadable in bar to a new action. *Bulling v. Rogers*, Bar. 278.

(B) (B) Of the Nature of an Arrest of Judgment, and to what Courts and Cases it extends.

Causes of arresting judgment must be on the face of record;

for if record be only deficient, error must be brought, and diminution alleged.

How far power of inferior courts in this respect.

No arresting judgment after judgment on demurrer; otherwise, after judgment by default.

How on convictions.

Arrests of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested, but for that which appears upon the face of the record itself. *Packey v. Harrison*, Raym. 232.

Thus, if an infant brings an action by guardian, and no warrant for him to appear by guardian is entered on record, judgment will not be arrested; but error must be brought, and diminution alleged and certified, and judgment will be reversed. *Ibid.*

An inferior court may set aside an interlocutory judgment, in two cases; viz. For irregularity, and to let in a trial of the merits, even though the judgment were regular.

So they may set aside a verdict for irregularity, but they are not trusted with a power to set aside verdicts upon the merits. *Rex v. Peters*, Burr. 572.

After judgment on demurrer, there can be no motion to arrest the judgment, as the court will not suffer any one to tell them that the judgment they gave, on mature deliberation, is wrong. But otherwise, in case of judgment by default; for that is not given in so solemn a manner; or, if the fault arises on the writ of inquiry, or verdict, for there the party cannot allege it before. *Edwards and Blunt*, Str. 425.

When a conviction is removed by *certiorari*, no notice can be made in arrest of judgment, unless the defendant be personally present. *The King v. Spraggs*, Blac. 209.

(C) (C) Of the Grounds of arresting the Judgment.

Cause of arresting judgment must be good ground of demurrer, but not *è converso*;

It is a general and invariable rule, with regard to arrests of judgment upon matter of law, "that whatever is alleged in "arrest of judgment, must be such matter as would, upon "demurrer, have been sufficient to overturn the action or "plea." But this rule will not hold *è converso*; viz. That every

every thing that may be alleged as cause of demurrer, will be good in arrest of judgment; because now, many omissions and defects, if not taken advantage of in time, are cured by the statutes of jeofails, or by a verdict.

Thus, after a verdict where defendant's name was put in the count instead of plaintiff's, judgment will not be arrested; because, by stat. 16 & 17 Car. 2. c. 8. judgment shall not be stayed after a verdict, by reason of mistaking the name of plaintiff or defendant in pleading. *Richards v. Simonds*, Blac. 40.

for many defects are cured by statutes of jeofails.

So where issue was local, and not tried in right place; *Maitland v. Taylor*, Ld. Raym. 1212.; or an issue is misjoined, Str. 641. *Harvey v. Peake*, Burr. 1793.

But if there be no issue at all, as where *similiter* was wanted, it is bad. *Cooper v. Spencer*, Str. 641.

But record may be amended and *similiter* added.

The statutes of jeofails relating to cases after verdicts are, 32 Hen. 8. c. 30.; 18 Eliz. c. 14.; 21 Jac. 1. c. 13.; and 16 Car. 2. c. 8.; which last has been called the Omnipotent Act from its extensive operation, and the student may there find the various defects and omissions a verdict cures.

So omissions are often cured by the verdict itself.

Also by a verdict.

The court are extremely cautious how they arrest the judgment after verdict. They will not intend any thing to overturn it: they will over-rule objections, which they would have listened to on demurrer. *Weston v. Mann*, Burr. 1725.

In what cases the court will arrest judgment after verdict.

They will even suppose every thing proved at the trial which was necessary to be proved, unless the contrary could be made to appear on the record. *Bull v. Steward*, 1 Wil. 255.

Every thing necessary supposed to be proved;

Thus if a declaration or plea omits to state some particular circumstance, without proving of which at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict; as if in an action of trespass the declaration doth not allege that the trespass was committed on any certain day; or if the defendant justifies by prescribing for a right of common for his cattle, and does not plead that his cattle were levant and couchant on the land. Though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue and has a verdict against him, these exceptions cannot after verdict be moved in arrest of judgment; for the verdict ascertains those facts which before, from the inaccuracy of the pleadings, might be dubious; since the law will not suppose that a jury under the inspection of a judge, would find a

though omitted to be stated on the record.

verdict for the plaintiff or defendant unless he had proved those circumstances, without which his general allegation is defective. *Blac. Com.* 394.

So in ejectment, though declaration does not state in what vill lands lie; but afterwards says that defendant, at B. aforesaid, ejected him, &c., it shall be intended after verdict, that the lands lay at B. *Goodright v. Strother*, *Blac.* 706.

Thus a title,

Thus a verdict will cure a title defectively set forth; but it will not cure a defective title. *English v. Burnell*, 2 *Wil.* 261.

If defectively set forth, is cured, but not a defective title.

The rule is this, where the plaintiff has stated his title or ground of action defectively or inaccurately, since to entitle him to recover, all circumstances necessary in form or substance to complete the title so imperfectly stated must be proved at the trial; it is a fair presumption after a verdict, that they were proved: but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial; and therefore there is no room for presumption. *Rushton v. Aspinale*, *Do.* 683.

Causes therefore must be stronger than mere causes of demurrer.

We find, therefore, that exceptions moved in arrest of judgment must be much more material and glaring than such as will maintain a demurrer, or, in other words, that many inaccuracies and omissions, which would be fatal if early observed, are cured by a subsequent verdict, and not suffered in the last stage of a cause to unravel the whole proceedings. 3 *Blac. Com.* 394.

But for manifest defects on the face of the record, judgment will be arrested; as if plaintiff be such as cannot maintain the action;

But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, *English v. Burnell*, 2 *Wil.* 258. *Salk.* 365. Or if the action be brought by plaintiffs who from the face of the record cannot in law maintain it; as where trespass was brought by A. and B. for breaking the house of A. and taking the goods of A. and B. *Maddox and another v. Taylor*, *Raym.* 1382. Or where plaintiff declared as administrator of an executor when administration *de bonis non* ought to have been taken out, *Bastard v. Jutsham*, *Barr.* 444. Or if defendants in the action be such against whom the action cannot be maintained, as where one obligor only was sued on a joint bond, and it appeared such in declaration. *Horne v. Moor*, *Barr.* 2614.

or defendant such as cannot be sued.

In all such cases judgment must be arrested.

So in trespass for taking divers goods, not saying what goods; after verdict and damages for plaintiff, judgment was arrested. *Wyat v. Effington*, *Raym.* 1410. *Str.* 637.

If there should be in the declaration different causes of action which cannot be joined, or plaintiff should sue in different capacities himself, or against defendant in different rights, judgment will be arrested.

If different causes of action which cannot be joined.

The general rule is, where the same plea and the same judgment will do for all the counts, they may be joined. *Mast v. Goodson*, 3 Wil. 352. *Brown v. Dixon*, 1 D. & E. 276.

Where there are two counts, and the supposed cause of action in one of them not actionable, and entire damages are given, the court cannot pronounce judgment on the record, but on motion it will be arrested: as in slander, if on a general verdict, the words in any one count are not actionable. *Onslow v. Horne*, 3 Wil. 185.

It is of great consequence to plaintiff to take care what verdict he takes if there be any count in his declaration doubtful in point of law, since the jury may assess entire or distinct damages on all the counts; if the former, and any one is bad, judgment will be arrested; but if the latter, judgment may be given upon any good count. *Onslow v. Horne*, 3 Wil. 185.

Plaintiff should be careful how he records a general verdict with intire damages; why.

Where one count appears bad, and the verdict is entered generally on all the counts, the court must reverse the judgment *in toto*, since they cannot see on which of the counts the damages were given: But not so if the damages were assessed severally; so that where the plaintiffs who were assignees of A. and B., two bankrupts under separate commissions, brought an action against defendant for a joint debt due from him to both the bankrupts, and for separate debts due to each, and having obtained a verdict not in a gross sum, but the damages assessed severally upon the respective counts; the court afterwards, on motion in arrest of judgment, arrested the judgment on the counts for the separate debts due to each bankrupt, but suffered plaintiffs to enter it up on the counts for the joint debts. *Handcock and others, Assignees, &c. v. Haywood*, 3 D. & E. 434.

If damages assessed severally, not such danger.

If plaintiff take a verdict on one particular count, and that count afterwards proves a bad one, he cannot resort to another, but must be bound by his election, and judgment will be arrested. *Holloway v. Bennet*, 3 D. & E. 448.

How if he elects a count, and that is bad.

So judgment will be arrested, if it appears that there was no writ or process to give the court jurisdiction, but proceedings have been carried on by consent.

If cause brought on by consent;

The plaintiff's goods distrained were not replevied, but, by consent of the attornies on both sides, remained in the distrainer's hands, and without any writ of *re. fa. lo.* or appearance in this court, plaintiff declared; defendants

without process, &c. court will afterwards arrest judgment.

avowed : and after long special pleadings, and after trial of the issues at the assizes, and a verdict for plaintiff, the avowants moved to set aside all the proceedings, and the rule for that purpose was made absolute ; the court held the agreement to be void ; a fraud upon the revenue and officers, and an abuse of the court and the bar, that they had no jurisdiction, and consequently could not give judgment. *Richardson v. Frank*, Bar. 451.

So if there was a plea in abatement, and it is not entered on record.

Formerly if on a plea in abatement, a *respondeas ouster* was awarded, and afterwards defendant pleaded in chief, and there was a verdict for plaintiff ; yet if the plea in abatement had not been entered on the *nisi prius* record, judgment was arrested ; for, it being entered on the plea roll (which was in court) it must be mentioned in the *nisi prius* roll, otherwise it does not appear that it was a verdict in the same cause. Carth. 447. 5 Mod. 399. Raym. 329. But such an irregularity seems now to be cured by defendant's accepting the issue, and going on to trial. *Combe v. Pitt*, Burr. 1682.

The above cases are after verdict.

Of arresting judgment after judgment by default.

After judgments by default, court not so strict in arresting judgment ;

Thus we have endeavoured to shew the lengths which the courts will go to support a verdict, and the necessity they are under in certain cases of arresting the judgment. It may be proper here to observe, that this anxiety of the courts only extends to judgments after verdicts, and not to judgments by default. Whenever, therefore, a motion is made to set aside an inquisition, the court will not *intend any thing* in support thereof. But the objection is considered as coming before the court exactly as if it were upon demurrer, and not like the cases of objections to judgments after verdict. For *per* Lord Mansfield, the true distinction as to supplying such defects is, whether the objection be made after a verdict or not. *Collins v. Gibbs*, Burr. 899.

though to such cases statutes of jeofails are extended.

With respect, however, to all such omissions or defects as are cured by the different statutes of jeofails after verdicts, they are also equally cured by judgments of confession or default ; provided there be an original writ or bill, and warrant of attorney duly filed. 4 & 5 Ann. c. 16. s. 2.

Where defendant means to arrest judgment for default in declaration, he should not attend inquiry.

If defendant wishes to take advantage of any fatal mistake in declaration by moving in arrest of judgment, he must not, after having suffered judgment by default, attend the execution of writ of inquiry, and cross-examine plaintiff's witnesses, or the like, but he must rely on the mistake. *Freeland v. Hunt*, 2 Wil. 380.

How he ought to move.

If he does rely on the mistake, he may afterwards move, that interlocutory judgment be forthwith entered upon record, agreeable to the declaration delivered, and the roll be brought into the proper office ; and that defendant may have four

four days to move in arrest of judgment after roll is brought in. *Ibid.*

Trespass against two; A. let judgment go by default; B. justified, and on trial had a verdict; but damages were assessed against A. at the trial. On motion, in arrest of judgment, it was insisted, the rule ought to be discharged, because a tort differs from a contract; for in covenant against two, if one pleads a plea that goes to the whole, and on issue joined it be found for him; and the other lets interlocutory judgment go by default; the plaintiff cannot have final judgment against him, according to 1 Lev. 63. But says that case, in trespass one defendant may be guilty, and the other not: But held, that if in a plea personal against divers, one pleads in bar to parcel, or which extends only to him that pleads it; and the other pleads a plea that goes to the whole; the last shall be tried first, because it goes to the whole, and the other shall have the advantage of it; for in personal actions, the discharge of one is the discharge of both; and no judgment can be given against the other defendant, because it appears the plaintiff had no cause of action. Judgment arrested. *Biggs v. Bengor*, Raym. 1372.

In trespass, where one let judgment go by default, and the other justified, and on trial was acquitted, and damages were assessed against the defendant by default, judgment was arrested.

In trespass against two, there was judgment by default; and on the inquiry, separate damages were assessed, 20 l. against one, and one penny against the other; and judgment was arrested, for damages cannot be severed where the trespass is confessed, as by letting judgment go by default. *Onslow v. Orchard*, Str. 422.

So where separate damages were assessed on inquiry.

(D) Of awarding a Repleader.

If by any mistake or inadvertence in the pleadings, the issue be joined on a fact totally immaterial or insufficient to determine the right, so that the court upon the finding cannot know for whom the judgment ought to be given; as if in an action on the case in *assumpsit* against an executor as executor, he pleads that he himself (instead of the testator) made no such promise; 2 Vent. 196.; or if in action of debt on bond conditioned to pay money on or before a certain day, the defendant pleads payment on the day; which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid before; *Tryon v. Carter*, Str. 994., and the like. In these cases the court will, after a verdict, award a repleader. "*Quia videtur curia quod placitum prædictum et exitum superinde junctum est minus sufficiens in lege, ideo dictum est partibus quod replacent.*"

A repleader, what.

Kk 4

But

But if it appears from the whole record, that nothing material can possibly be pleaded in any shape whatever, and that a repleader would be fruitless, it will not be awarded. *Rex v. Philips*, Burr. 301.

The consequence of a repleader, &c.

Whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, wherein there appears to have been the first defect or deviation from the regular course. 3 Blac. Com. 395.

No repleader is allowed before trial; *Staple v. Haden*, Salk. 579. If denied where it should be granted, or granted where it should be denied, it is error. *Ibid.* No costs to be allowed on either side, for both parties are in fault, to suffer an immaterial or insufficient issue to be joined. *Ibid.* A repleader cannot be awarded after a default. *Ibid.* See the form of a repleader, Lut. 1622.

SECTION IV.

Of taxing Costs and signing final Judgment.

Rule for judgment having been given;

We have already shewn, in the first section of this Chapter, how to give rule for judgment on the *posse* or inquisition, and at the expiration thereof, to carry the same, with the necessary papers, to the Master in B. R. and prothonotary in C. B. to get the costs taxed, and final judgment signed thereon.

How to tax costs.

Of the attendance of the parties.

If the party, against whom a verdict is obtained by trial or inquiry, wishes to be present on taxing costs, and distrusts the attorney on the other side, fearful lest he should not give notice thereof, which it is usual for fair practitioners to do, let him get rule from clerk of rules in B. R. or secondary in C. B. to be presented at taxing costs; pay 4s. It must be served on the attorney of the other side, and should be taken out and served before time for signing judgment is out, or execution may issue against the party. If final judgment is not signed, and party takes out and serves rule to be present, &c. after rule for judgment is out, the attorney is not obliged to give him more than a few hours notice of taxing costs; but if taken out, and served before rule for judgment is expired, attorney on the other side must give twenty-four hours notice when he intends to tax costs.

Of taking out rule to attend taxation.

When and how rule to be served.

Of the notice of taxation, to be given in consequence thereof.

Of the affidavit for allowance of extra expences.

If, upon the taxation of costs, you want to be allowed any extra expences, you must make an affidavit of the facts, stating the distances the witnesses came, the charges you were put to, and the particular circumstances.

In

In country causes, such affidavit is generally made, and sent up to the attorney in London, who must carry same to clerk of rules in B. R. and secondary in C. B., and file them there, and pay him 8*d.* per sheet for a copy to be made ut for the Master. Amongst fair practisers also, a copy is sent to the opposite attorney; for which pay 4*d.* per sheet.

How made in country causes.

When costs are taxed, which are called costs *de incremento*, final judgment is then said to be signed upon the *possea* or inquisition, and execution may be sued out.

Taxed costs are costs *de incremento*. Final judgment is now said to be signed.

SECTION V.

Of docketing Entries and Judgments.

But it is further necessary to enter the judgment and docket the same; which is done, by carrying the *possea* or inquisition, with the Master's *allocatur* thereon, to Westminster to the treasury, and leaving it there. The clerk enters the judgment thereon; pays 2*s.* for *possea*; 1*s.* 6*d.* for inquiry. This, however, is upon the supposition that the roll has been already carried in after issue was joined, and before trial, in manner as shewn in the first Section of the ninth Chapter; for if not, it must be now carried in and filed, as of the term issue was joined, and the judgment entered thereon and docketed.

Of docketing the judgment:

how to be done.

By rule in K. B. *East. 17 Jac. 1.* all judgments for sums amounting to 20*l.* are to be regularly docketed; by the attorney making a note on parchment or paper, containing the names of the parties, the debt and damages recovered, and the term and roll where such judgment shall be entered, and delivering it to the proper officer, who is to register the same in a book kept for the purpose. And by rule *East. 1657*, the defendants names in all judgments to be entered, shall be entered in a remembrance or docket alphabetically, for the better finding out such judgments.

If plaintiff has obtained judgment otherwise than by verdict, as by default, or confession upon a suit by original, his attorney ought to make out a *præcipe* for an original, returnable on the first return of that term in which judgment is, (whether it be final or interlocutory judgment, in case of actions sounding in damages,) to warrant the judgment, in case a writ of error should be brought; which *præcipe* must be carried to the curfitor of the county where the action is laid on or before the effoin-day of the subsequent term; otherwise, by an order in Chancery, he cannot make out an original writ of a return past after that time, without special warrant

How original to be obtained, in case of judgment by default by original, in order to prevent error.

Which original
is to be returned
and filed.

Of the entry-
roll, and doc-
keting same:

often neglected
till after judg-
ment;

unless he is
compelled to
enter issue.

warrant from the Lord Chancellor, Lord Keeper, or Master of the Rolls. *Vide* Lord Clarendon's Orders in Chancery.

The original writ in such case being made out, the plaintiff's attorney returns it of course, and then files it with the *custos brevium*; and he must also file a warrant of attorney, both for himself and for defendant, if he appeared by attorney. This is necessary to prevent writ of error. See 4 & 5 Ann. c. 12. s. 2.

Whenever issue is joined between the parties, an entry of all the pleadings should then regularly be made upon a roll, which should be carried in and filed of that term in which issue is so joined.

This, however, is for the most part now neglected to be done; and the attorney for the plaintiff proceeds on to trial, postponing the entry of his pleadings till after he has obtained judgment, and often to a much later period, when he enters and docketes all the pleadings and judgments in various causes, in which he may for some time past have been concerned.

It often happens indeed, as may be seen *ante*, chap. 9. sect. 1. that the plaintiff is obliged to make this entry by a rule to enter the issue, and if not so compelled, it is always advisable to carry in the roll, and docket the same, soon after judgment is obtained.

The way to proceed is as follows:

In B. R.

How to proceed
in carrying in
rolls and docket-
ing entries.

Get roll from the clerk appointed (a) to deliver out rolls, now Mr. Adams of Lincoln's-Inn, stationer, who stamps it about the middle. A little below this you begin your entry; first, the term in which issue was joined.

Hitherto of the term of 37 Geo. 3. 1798.

Witness, Lloyd Lord Kenyon. Then enter warrants of attorney (b). London, J. A. B. puts in his place Thomas

In C. B.

Get a roll from the prothonotary's office, of the term in which the issue is joined; make out the warrants of attorney of the same term, on a plain piece of parchment, thus: In the Common Pleas. Michaelmas term, in the 37th year of the reign of George the Third.

Middlesex, to wit. Richard Fenn puts in his place T. S. his attorney, against John Denny, late of,

(a) No rolls to be received or allowed for by the clerk of the treasury, unless marked by the person appointed by the chief justice to deliver out rolls. Trin. 12 Geo. 2. 1738.

(b) Warrants of attorney to be entered on the roll at the beginning of the cause, otherwise the roll not to be received or filed. R. E. 4 Jac. 2. They are supposed to be filed at the commencement of the action. 1 Ld. Raym. 509. The rule of 5 Ann. 1706, for delivery over to the opposite attorney the warrant, is now obsolete, and the practice is for plaintiff's attorney to enter them on the roll as above.

Thomas Smith his attorney, against C. D. in a plea of trespass on the case (or of debt, or as the case may be).

London, ss. The said C. D. puts in his place Joseph Allen his attorney, at the suit of the said A. B. in the plea aforesaid.

Then go on with the memorandum and copy of the issue thus:

London, ss. Be it remembered, that (here enter the whole issue thereon),

Having thus completed the entry of the issue, the roll is ready to be carried in.

But, for the better finding of the roll when carried in, a docket must be made, and left with the clerk of the judgments, who enters the same in alphabetical order, by the defendant's surname, in a book kept by him for that purpose.

But before you make out the docket, you must get a number for your roll (or if more rolls than one, numbers for each). This number, if you apply for it of the same term in which your issue is entered, may be had of the clerk of the judgments, King's Bench office; but if your issue is of a preceding term, then you get it from the nisi prius office, for which you pay 4s. 8d.; you then make out your docket paper, and carry the roll to the clerk of the judgments, and he enters it. The docket is merely a slip of paper, on which is written a minute of the issue or judgment, as thus:

The entry of Thomas Smith gentleman, of Hilary term 37 Geo. 3. Middlesex. Issue joined in debt, between A. B. plaintiff, and C. D. defendant, on a plea of nil debet. Roll. 485.

Or if on judgment by default, Norfolk. Judgment by default in case between A. B. plaintiff, and C. D. defendant. Roll. 486.

Or,

of, &c. yeoman, in a plea of trespass on the case.

Middlesex, to wit. The said John Denn puts in his place J. A. his attorney, at the suit of the said Richard, in the plea aforesaid.

Take it to the warrant of attorney office and file it, pay 8d. in debt, case 1s. 4d.; then take the roll to the prothonotary's, with the entries thereon complete, if you have signed final judgment; if not, as far as you have gone in the cause: If the entry of the issue or demurrer be paid for before, you pay nothing, if not, 8d. per sheet; then the clerk will give you the docket roll to enter the causes; if the action be in trespass, the prothonotary's clerk pays for bringing in the roll 4d. per sheet.

The form of the docket is as in B. R.

Or, London. Judgment by nil dicit, between A. B. plaintiff, and C. D. defendant, for 100l. debt, and 63s. damages. Roll. 487.

Varying the docket as the case is, and if more entries than one to be made, having got numbers for the rolls accordingly, make out docket of them all on one paper.

Take docket paper with the roll to clerk of judgments, who will mark roll, to whom you pay 3s. for docketing; then carry roll to the clerk of the treasury, who will file same in treasury.

If the roll be not carried in and filed as of the term issue is joined, then you will have to pay a post terminum 4s. 8d. and 1s. more for the docket.

If this be done at proper time before trial, there is nothing to do after judgment, but to carry postea or inquisition, with Master's allocatur, to the treasury, and leave it there for clerk to enter judgment thereon.

Attornies shall bring in the rolls of every Trinity, Michaelmas, and Hilary terms, and file the same before the essoin-day of the subsequent term, and the rolls of Easter before the first day of Trinity term following. Mich. 5 Ann.

But the custos brevium, in indulgence of the clerk, attends the day but one before every term to receive and file the rolls. He used formerly to attend the day before Trinity term for that purpose; but now he attends the day but one before Trinity.

But clerk will charge you a post diem one day before the term begins, if your roll be not filed in time.

The several and respective officers of this court shall deliver in all their rolls of Trinity, Michaelmas, and Hilary terms to the clerk of the essoins, before the essoin-day of the several terms following, and their rolls of Easter upon or before the first day of Trinity following; and the officer who shall not bring in or send all his rolls of the several terms at these times, shall pay to the clerk of the essoins 12d. for every roll brought in after.

Plea rolls are to be brought in in three weeks after the end of the term following, or if after, 12d. to be paid. Pasch. 5 W. & M.

On motion, a new roll was ordered to be filed, the former being lost; for there being a docket of it made before it was lost, it could be no deceit on purchasers. Evans v. Thomas, Str. 833.

New roll ordered, old one being lost.

All

All issues and judgments ought to be entered on the rolls, in a fair hand, with a large margin of an inch at least, and a convenient space left at the top (about ten inches) for binding up the same, and like space at the bottom, that the writing be not rubbed out. How to be ingrossed.

The issues may be entered on both sides the roll, but should not come too near the bottom, where the roll must be numbered, &c.

When the judgment roll is made out, the same ought to be filed in the treasury of the court. Judgment-roll to be filed in treasury.

A neglect of entering judgment, and a loss of the roll, having been sufficiently shewn to the court, a rule was made, "That the clerk of the judgments shall sign a new roll, whereon is entered the judgment signed in this cause, in Michaelmas term 1729; and that the same be numbered as roll 256, and filed amongst the rolls of that term, a special entry being first made, expressing the day of docketing the same." And it is further ordered, "That this judgment shall not be made use of against the administrator of the defendant." Form of rule for new roll.

Note; Lord Mansfield intimated, that it very much concerned the chief clerk to take care that judgments be actually entered up upon the roll in due time, and docketed; for that after he has received his fees for making such entry, he would be liable to an action upon the case, to be brought by a purchaser who should have become liable to it, and had searched the roll without finding it entered up. And he said, that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief clerk; but still the chief clerk would be liable to the purchaser who had suffered by this neglect. *Douglas v. Tallop, Burr. 722.* Chief clerk responsible if judgment not entered after he has been paid for same.

N. B. The present course is for the attorney for the plaintiff to undertake to make this entry upon the roll: for doing which the chief clerk (who is entitled to 8 d. *per* sheet) allows him 5 d. *per* sheet: so that the attorney in this case acts as one of the clerks of the chief clerk, which would render the chief clerk liable to the party's action, though the attorney would be answerable over to him (in fact the attorneys are very apt to be negligent in bringing in these entry-rolls).

The statute 4 & 5 W. & M. c. 20. intituled, "An act for the better discovery of judgments in the courts of King's Bench, Common Pleas, and Exchequer at Westminster," provides first, in what manner and at what time judgments shall be docketed by the respective officers in books for that purpose, that the same may be searched for by any one paying for the same; and upon neglect of the officers in such case, gives the penalty of 100 l., half to the party grieved, and the other half to any one who shall sue for the same, &c. By statute of 4 & 5 W. & M. no judgment not docketed shall affect purchasers, &c.

And,

And by sec. 3. No judgment not docketed and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, and administrators in their administration of their ancestors, testators, or intestates estates.

N. B. This only relates to freehold lands.

And by sec. 4. gives the clerks of the judgments four-pence over and above their usual fees, for their trouble.

And by 29 Car. 2. c. 3. officers signing judgments shall enter the day of signing the same, and such judgments shall not bind the lands in the hands of a bona fide purchaser, but only from the time of actually signing the same, nor the goods in the hands of a stranger or purchaser, but only from the actual delivery of the writ of execution to the sheriff.

Before these statutes the judgment having relation back to the first day of the term of which, or as of which it was given, became a charge upon a moiety of the real and the whole of the personal property of which the defendant was seized or possessed at that time.

Motion to set aside the docket of a judgment as void by 4 & 5 W. & M. denied, there appearing no fraud, but that the roll was accidentally mislaid.

Judgment was signed in Hilary 1733, but by omission of plaintiff's agent, the roll was not docketed and carried in till June 1737, and the true day of docketing was marked upon the docket by the clerk of the effoins. M. who pretended to be a purchaser of defendant's estate for valuable consideration in January 1736, without notice of this judgment, moved and had a rule to shew cause why the docket should not be set aside as void by the stat. 4 & 5 W. & M. On shewing cause it appeared, that the judgment was for a *bona fide* debt; that the roll was accidentally lost, and omitted to be carried in; but the true time of docketing appeared to be fairly entered without fraud; and an *elegit* upon this judgment, appeared to be executed 1735, and that M. had notice thereof, who seemed upon the affidavits to be a colourable purchaser to assist defendant. *Per Cur.* the true time of docketing not being concealed, and no fraud appearing on part of the plaintiff, we will interpose; M. may bring his ejectment and take what advantage he can. It appeared that M. had not made search for judgments against defendant till after his purchase. Rule discharged. Bar. 261. *Wait v. Garth.*

Judgment by confession upon a warrant of attorney may be entered in vacation as of the term precedent, though defendant died in vacation.

Defendant gave a warrant of attorney to confess judgment, and died within a year after, in time of vacation, before the effoin day of the subsequent term, which was Easter. The attorney, after his death, entered up the judgment as of the precedent term, Hilary, but did not bring in the roll before the effoin day of Easter term; and, on motion to set it aside, the court held the judgment to be regularly signed as of the precedent term, as the party died in the vacation, and it was a good judgment of such precedent term, though it

would not affect purchasers, but from the time of signing; but as the roll was not brought in and docketed before the effoin day of the subsequent term, it was irregular. For *per Cur.* by the course and practice of the court, all the rolls of Hilary ought to be brought in before the effoin day of Easter term, and made part of the bundle of Hilary; and it is for this reason that what is done in vacation is looked upon as the act of the term preceding; and there cannot be a *post terminum* roll received without leave upon motion, which the court does not grant, but when it appears that no one will be prejudiced: for if this were to be allowed, the statute of frauds, and the statute of King William for docketing judgments, would be frustrated; and therefore they disallowed the filing it. *Odes and Woodward, Salk. 87.*

If defendant has a freehold or leasehold estate in Middlesex or York, you may register the judgment, which will affect them from the day of registering.

But roll ought to be brought in before effoin-day of subsequent term.

Post terminum roll cannot be filed without leave of court.

Of registering judgments in Middlesex and York.

Form of memorial.

A memorial to be registered pursuant to the statute, &c.

Of a judgment in his Majesty's court of King's Bench of Trinity term in the 37th year of the reign of King George the Third, between John Cox plaintiff, and Richard Fenn defendant, in a plea of debt for 1000 l. and 63 s. damages. Roll, 50.

I do hereby certify, that judgment was signed in the above cause the 9th day of June 1798.

Robert Foster.

W. H. clerk to J. S. of, &c. gentleman, maketh oath, and saith, that he was present, and did see Robert Foster Esquire, secondary of the court of King's Bench, sign the certificate of the judgment in the memorial above mentioned.

Ingross this memorial and certificate on a piece of parchment with a treble 6d. stamp thereon, carry it to the master of the King's Bench office, and he will, on seeing your postea, inquisition, or judgment-paper, subscribe the certificate; swear the affidavit before a master in Chancery, or a judge of the court where the judgment was obtained; and when done, file it with the registrar in Bell-yard; pay the master 1s. oath 1 s. and 5 s. filing.

N. B. The clerk of the dockets may certify in the absence of the master or his deputy.

C H A P. XII.

Of Execution.

- (A) The Nature and different Kinds of Execution.
- (B) When, by whom, and against whom to be sued out; and herein of joint and several Executions.
- (C) Into what Places Execution may go; and herein of the *testatum* Writs.
- (D) Of the *Teste* and Return of the Writs of Execution, and of amending the same.
- (E) Of the Mode of executing the several Writs of *Ca. Sa.*, *Fi. Fa.*, and *Elegit*.
- (F) Of the Lien for Rent on Goods taken in Execution.
- (G) Of issuing a second Writ of Execution.
- (H) Of the Sheriff's Poundage, Fees, &c.
- (I) Of superseding Execution by Writ of Error, or otherwise.
- (K) Of entering Satisfaction on the Roll.

(A) (A) Of the Nature and different Kinds of Execution,

Execution
whit.

IF the regular judgment of the court after the decision of the suit be not suspended, superseded, or reversed, the next and last step is, the *execution* of that judgment, or putting the sentence of the law in force. This, indeed, is the grand object of the suit.

*Executio est fructus et finis legis;**Prosecutio legis est gravis vexatio;**Executio legis coronat opus.*

Co. Lit. 289.

Hence execution is sometimes emphatically called the *life* of the law.

How enforced.

Execution of a judgment is enforced by the party who has obtained the judgment suing out a certain writ, founded upon and suitable to the action in which the judgment has been given, and directed to the sheriff of the proper county, which

which writ is supposed to be granted at the request of the party entitled thereto, for the purpose of affording him satisfaction of the judgment so obtained by him.

Writs of execution, therefore, differ according to the nature of the action, namely, whether it be *real*, *mixed*, or *personal*. But as this volume of Practice has been merely confined to the prosecuting of suits in *personal* actions, we shall at present treat only of the execution of judgments obtained in such suits.

Different writs.

There are three sorts of execution generally in use for obtaining satisfaction of judgments in personal actions, either of which the party at his election may adopt, but he cannot pursue two sorts at one and the same time.

Three sorts of execution in personal actions.

The highest of these is a *capias ad satisfaciendum*, the second an *elegit*, and the third a *fieri facias*; the first being against the person of the defendant, the second against his goods and lands, the third against his goods only.

The *capias ad satisfaciendum* is a writ directed to the sheriff, commanding him to apprehend the defendant, and by virtue thereof he is deprived of his liberty, till he makes the satisfaction awarded: For neither the sheriff nor court can admit him to bail; and, therefore, when he is once in custody upon this writ, no other sort of execution can be sued by the plaintiff against his property; for the maxim of the law is, *corpus humanum non recipit estimationem*. But if he should happen to die, while charged in execution upon this writ, the plaintiff may, by the 21 Jac. 1. c. 24. after his death sue out other execution against his lands, goods, or chattels, at his election.

Of the *capias ad satisfaciendum*.

A *capias ad satisfaciendum*, by the common law, lay only in trespasses *vi et armis*, being a direct and wilful wrong, and wherein the *capias ad respondendum* was the immediate process upon the original writ. But several statutes having given the process of *capias ad respondendum*, as the mesne process upon the original writ in other personal actions, than those committed *vi et armis*, the *capias ad satisfaciendum* has become an executory process in them also, it being held as a rule, that where a *capias* lies in process before judgment, it will lie in execution upon the judgment itself. So in all actions by *bill* in B. R. a *capias ad satisfaciendum* lies in execution by the course of the court; for the bill, and its subsequent process, the *latitat* and *capias*, are, in their nature and consequence, of the force, validity, and effect of a *capias ad respondendum*.

The *elegit*, so called because it is in the election of the plaintiff to sue it out or not, was given as process of execution by the statute Westm. 2. c. 18. By this writ the sheriff is commanded to take and deliver to the plaintiff

Of the *elegit*.

tiff the defendant's goods and chattels upon reasonable appraisement and price (except his oxen and beasts of the plough); and if his goods and chattels are not sufficient to satisfy the debt or damages awarded, then the moiety of his lands and tenements, which he had at the time of the judgment given, is also to be delivered, until out of the rents, issues, and profits thereof, the debts and damages are levied, or till the defendant's term therein be expired, as if he be only tenant for life or in tail.

Of the fieri facias.

The *feri facias*, which is an old common law process of execution, is also a writ directed to the sheriff, commanding him, that he cause to be made of the goods and chattels of the defendant, the debt or damages recovered, and give the amount thereof to the plaintiff. This writ, and another writ called a *levari facias*, which commanded the sheriff to levy or make of the lands (i.e. of the issues, rents, and profits thereof) and chattels of the defendant, the sum recovered, were the only common law processes of execution. But when the stat. Westm. 2. gave the *elegit*, the *levari facias* fell into disuse, and was seldom sued out, unless against ecclesiastics, after return made by the sheriff, that the defendant was *clericus beneficiatus nullum habens laicum feodum*; and then it was directed to the ordinary or bishop, who thereupon sent forth a sequestration of the profits of the clerk's benefice, directed to the churchwardens, &c. to gather up the same, and pay them over to him that had the judgment till the debt was paid. But the general mode now is to sue out a *feri facias* or *bonis ecclesiasticis*, which is sent to the registrar of the diocese, who will make out a sequestration, the plaintiff first giving security by bond to the bishop.

These writs lay for costs of nonsuit, &c.

All the above writs may also be sued out as process of execution for costs obtained by the defendant against the plaintiff, if he is nonsuited, nonprossed, &c.

These writs specify the nature of the action, and the judgment recovered; and differ in the return of them, as the action may be, by *bill* or *original*. For all of which forms, see the Books of Entries. The forms of them are printed with blanks, and *ca. fa.*'s and *fi. fa.*'s may be had at the stationers, neither of which need be signed, but they must be sealed.

(B)

(B) When, by whom, and against whom Execution ought to issue; and herein of joint and several Executions.

When execution should issue.

Execution ought to be sued out within a year and a day after the judgment, to be computed from the time of signing the judgment. *Sympson v. Fray*, Bar. 197.

The

The year to be reckoned by calendar months, and not by the terms. *Winter v. Lightbound*, Str. 301. How the time to be reckoned.

Formerly no delay was allowed, though execution was stayed by injunction out of Chancery. *Ibid.* Or by any written agreement between the parties. *Thompson v. Bristow*, Bar. 205. Exceptions to rule :

But it has since been decided, that where the whole delay has arisen from the part of the defendant by bills in Chancery for injunctions, and by obtaining time for payment, &c. execution may issue after the year without any *scire facias*, for that the *scire facias* was only intended to prevent surprise. *Michell v. Gue*, Burr. 660. When delayed by injunctions, &c.

So if the delay be occasioned by writ of error, though for many years, yet execution may issue immediately upon affirmation of the judgment without a *scire facias*. *Winter v. Lightbound*, Str. 301. or by writ of error :

If, however, without any such causes, execution be not sued out within the year and day, the judgment must be revived by *scire facias*, and judgment obtained thereon, before execution can issue. Otherwise scire facias necessary.

But the writ need not be actually *executed* within that period. For if the *fi. fa.*, *ca. fa.*, or *elegit* be but sued out and returned within the year, continuances may be entered upon the roll from term to term, to the time of the execution, which may be at any time after the year, and as good as if the judgment had been revived by *scire facias*. *Aires v. Hardesty*, Str. 100. If writ sued out, returned, and continued, though not executed, it is sufficient.

The writ, in such case, must be returned and filed, for the mere suing out and continuing it on the roll will not be sufficient. *Player v. Baldwin*, 2 Wil. 82. Bar. 213.

One sort of writ, so sued out and returned, will support the awarding of a different kind of writ afterwards. Thus a *ca. fa.* may issue after the year, upon a *fi. fa.* having been properly sued out, returned, and continued. *Ibid.* One sort of writ, so returned, will support a different sort afterwards sued out.

The writ of *capias ad satisfaciendum* does not lie against peers of the realm or their wives, or peers of Scotland, or members of parliament (except upon a statute merchant, pursuant to the statute of 11 Edw. 1. or statute staple, according to the 27 Ed. 3. or on a recognizance in nature of a statute staple, upon the 23 Hen. 8. c. 6.). Against whom the writs lie.

Nor against the king's servants. So that a junior clerk of the kitchen to the king, who had been taken in execution, was on motion discharged. *Bartlett v. Hobbes*, 5 D. & E. 686.

Nor against executors or administrators for the debt of the testator or intestate, except a *devasavit* is returned, and then a *ca. fa.* lies against their persons, or a *fi. fa.* against their goods.

An *elegit* lies against the peers of the realm, as well as others; and also against executors and administrators, upon a *devastavit* returned.

So does a *feri facias*.

In case of death,
where the action
is single.

If the plaintiff die before execution, it cannot issue till *scire facias* sued out by his representative, and judgment thereon; after which, such representative will be entitled to the money. Cro. Eliz. 459.

So, if defendant die before execution, *scire facias* must issue against his representative; and after judgment thereon execution may go against the goods of the deceased in his hands.

But if A. recovers judgment against B. and B. dies in the vacation within the year, A. may sue a *feri facias* as of the precedent term, and levy the goods of B. in the hands of his executors. *Odes v. Woodward*, Ray. 849.

If an administrator *durante minoritate* recover judgment, and afterwards the executor comes of age, he may have a *scire facias* on this recovery. Law of Ex. 7.

In cases of
baron and feme.

Where baron and feme recover land and damages, and baron dies, the feme shall have execution of damages. *Ibid.* 8.

So if baron and feme recover judgment in right of the feme, and she dies, baron shall have execution. *Ibid.* 10.

If baron and feme executrix obtain judgment, and the feme dies, the baron cannot have execution, but administrator *de bonis non*. So, if they obtain judgment on a *scire facias*. Cro. Car. 464. *Anon.*

In an action against a feme covert only, to which she pleads coverture and verdict for defendant, a writ of *feri facias* for the costs, directing the sheriff to levy and pay them to defendant *and her husband*, would be irregular; it being a maxim, that a person not a party to the record cannot be benefited nor charged by the process without a *scire facias*: But the wife might have had process in her own name, because the plaintiff having declared against her as sole, he was concluded from denying it. *Wortley v. Rayner*, Do. 637.

If baron and feme are taken in execution, the feme shall not be discharged. Bar. 203. *Berriman v. Gilbert & Ux.* But if the feme only is taken, she shall be discharged. Bar. 207. *Rownson & Ux. v. Williamson*, Pract. Reg. 208. But if baron and feme are taken in execution, and the baron escape, unless the plaintiff will retake the baron, the feme shall be discharged. 1 Vent. 51. *Jackson v. Gabree*.

In trover, if there is judgment and execution against baron and feme, the court will not discharge the feme, unless there

is fraud or collusion between plaintiff and the husband to keep her in custody. Str. 1167. *Pitts v. Meller*. So in battery by defendant's wife of plaintiff's wife, the court will not discharge the wife who is only in execution, if it appears there is no design to screen the husband. Str. 1237. *Finch v. Duddin*, Wil. 149. Though said, in Cro. Car. 513. that if judgment be recovered against baron and feme for the contract, nay, even for the personal misbehaviour of the feme during her overture, a *capias* shall issue against baron only.

If judgment is recovered against baron and feme for the debt of *feme dum sola*, a *capias* may issue to take both baron and feme in execution. Bar. 203. But if an action is brought originally against *feme dum sola*, and pending the suit she marries, a *capias* shall be awarded against her only, and not against baron. Cro. Jac. 323. *Doyley v. White*.

Action against baron and feme, for debt contracted by her *dum sola*; after judgment against them, the bail rendered them both to prison in discharge of bail, and on motion she was discharged. 3 Wil. 124. But where judgment and execution are against husband and wife, she shall not be discharged, but only where she is in custody upon mesne process; and when *husband* and *wife* are rendered in discharge of bail after judgment against them, they are in the same situation as if bail had never been put in; and not being charged in execution, the wife must be discharged out of prison. *Ibid*.

Execution may issue against one partner, in which case the partnership-goods are taken and sold, and the sheriff must pay over to the other partner or partners a share of the produce proportioned to his or their share in the partnership-effects. *Eddie v. Davidson*, Do. 650. Com. 217. Sal. 392.

In popular actions, there shall be but one execution for king and party. Law of Ex. 63.

If the action be against two or more, and judgment recovered against all, execution must go against all, and not against part only, and the same kind of execution must go against all.

For a separate *ca. fa.* against one defendant, on a joint judgment against two cannot be supported. *Clarke v. Clement and another*, 6 D. & E. 525.

If two be bound *jointly* and *severally* to A. and A. sue them *jointly*, A. may have a *capias* against them both, and the death or escape of one shall not discharge the other. But A. cannot have a *capias* against one, and another kind of execution against the other; because, though they be two several persons, yet they make but one debtor, when A. sues them *jointly*. But if A. sues them *severally*, he may sever them

In case of partners.

In popular actions.

In joint actions.

their kinds of execution; though if once a satisfaction be had of one, or against the sheriff for an escape of one, the other may be relieved by an *audita querela*. Hob. 59.

Verdict against *four* defendants, judgment by default against the *fifth*; error brought in the name of the fifth only; and on motion, the court gave leave to take out execution against the other *four*. Bar. 202. *Mason v. Symmonds and others*.

Judgment in trespass against *four*, execution must be against all; and if they bring error, and one dies, by which the writ of error abates, then plaintiff may sue execution against the surviving three, suggesting the death of the fourth on record, but need not sue a previous *scire facias*: for that is only necessary when a new party to the judgment is to be benefited or charged by the execution. Salk. 319. *Howard v. Pitt*, Show. 404.

How, if one plaintiff or defendant dies.

Where there are several plaintiffs or defendants, and one of them dies, execution may be sued by or against the survivors, upon suggestion of the death made upon the roll, *Wibbers v. Harris*, Ray. 808.

(C)

(C) Into what Places Execution may go, and herein of the *testatum* Writs.

Where *capias satisfaciendum* should issue, and of the *testatum capias satisfaciendum*.

The writ of *capias ad satisfaciendum* must be issued in the county where the venue is laid; and if the defendant cannot be found there, a *testatum capias ad satisfaciendum* may be issued into any other county. These writs may both issue the same day, and be sealed together; but it is necessary that a *ca. sa.* be sued out to ground the *testatum*. The court, however, will not inquire strictly into the time when the original *ca. sa.* issued, if it be but afterwards returned and entered on the roll.

Of the *fieri facias* and *testatum*.

What necessary to support *testatum*.

So it is also with respect to the writ of *fieri facias* and *testatum fieri facias*.

They are generally both sued out together, and the *fi. fa.* is left with the sheriff for a return of *nulla bona*.

For if a *testatum fieri facias* be sued out without any original *fieri facias* having issued, it will be set aside for irregularity. *Brand v. Mears*, 3 D. & E. 388.

Unless such original *fi. fa.* be afterwards produced and entered on the roll. *Ibid.*

And then it will do, though error be brought. *Ibid.*

So the court will not set aside a *testatum capias ad satisfaciendum* sued out without an original *capias*, though a writ of error has been brought, if a *capias ad satisfaciendum* be after-

afterwards sued out, returned, and entered on the roll. *Milstead v. Coppard*, 5 D. & E. 272.

If a *feri facias* be sued out, (when it should have been a *testatum fieri facias*,) without any other *feri facias* having originally issued, and the plaintiff afterwards sues out an original *feri facias*, the court will permit the party to amend the former on paying the costs, though error brought. *Cowperthwaite v. Owen*, 3 D. & E. 657.

As to the *elegit*, a man may award on the roll as many *elegits* as he pleases, and execute all or any at his pleasure; but it is said, if he awards an *elegit* in one county, extends the lands upon the writ, and afterwards files it, he is barred, and cannot sue out an *elegit* into another county, but an *actual writ* must be sued out, returned, and filed before an award can be entered on the roll. Imp. B. R. 5 edit. 396.

It is not necessary to insert the form of a *testatum* in a *testatum writ*, so as that it may appear from the writ itself to be a *testatum*. Rules and Orders B. R. and C. B. vol. 2. 79. Pract. Reg. 210. 212. But there must be an award of a *testatum* upon the roll. *Oates v. Forest*, Bar. 197.

Judgment in B. R. a *feri facias* into London, returned *nulla bona*, and a *testatum* into Montgomeryshire, to which the sheriff returned, that the writ of our lord the king does not run into Wales but at the king's suit, or where he is concerned. *Per. cur.* On a judgment in this court, execution may be awarded into Wales or a county palatine. Cro. Jac. 484. Cro. El. 445.—Lands in Wales are pleadable here. *Healey*, 18. 20, 21. 2 Bulf. 54. 156.—If the writ did not run there, yet the sheriff, being an officer of the court, ought not to question it, but to make return of the execution of it. And the court accordingly ordered the sheriff, upon a penalty, to return the writ, as he should stand by it: saying, that sheriffs in Wales ought to execute judicial writs, for the court has none to write to there as in counties palatine, where they write to the chancellor or chamberlain, or warden of the cinque ports. An *elegit* may be executed in Wales, and why not a *feri facias*? If it could not, the party would be without remedy; for he cannot bring an action there upon this judgment; and he cannot outlaw the defendant, because this is on a bill of debt against an executor. *Draper v. Blainey*, 1 Lev. 291. Ray. 206. 2 Saund. 193. 2 Keb. 649. 657. 724.

Motion to have restitution of goods levied by a *feri facias* out of B. R. in the county palatine of Chester, denied. *Per cur.* Executions may well issue out of this court, to the county palatine, on a judgment originally given here. 1 Lev. 256. *Anon.*

How *feri facias* may be amended and converted into *testatum*.

Where *elegit* should issue.

How far necessary to appear a *testatum* in the writ.

Of issuing writs of execution into Wales;

into county palatine.

(D)

(D) Of the *Teste* and Return of the Writs of Execution, and of amending the same.

Of the *teste*, if
issued out of
term;
if in term.

If the writ of *capias satisfaciendum* or *fieri facias* be issued out of term, let the *teste* be the last day of the term; if issued in term, *teste* the writ the first day of the term (although the judgment is not signed till four days after).

Though *teste*
before judg-
ment, it may be
good.

Execution may be good though the writ bear *teste* before the judgment signed; for the writ of execution, if sued out in vacation, may bear *teste* of the precedent term, even of the first day of that term, and judgment perhaps not signed till later in term, or in the vacation. *Parsons and Gill*, Com. 117.

Of the return,
if by bill or ori-
ginal.

If the proceedings are by bill, execution must be made out returnable on a day certain; if by original, on a general return-day.

Of the days be-
tween *teste* and
return.

There need not be fifteen days between the *teste* and return of any *capias satisfaciendum* or *fieri facias*; 13 Car. 2. c. 2. s. 7., except to fix bail, or in outlawry.

And then, if the proceedings are by original, there must. Bar. 76. But if proceedings be by bill, there need be only eight days between *teste* and return of *capias satisfaciendum* to charge the bail. Sal. 602. Ray. 1177.

If returnable on
a general return
when it ought to
have been a day
certain, bad.

In proceeding by bill *capias satisfaciendum* returnable on a general return-day, and not a day certain, as it ought to have been, was quashed, and defendant ordered to be discharged by supersedeas, with costs, defendant consenting to bring no action. *Per. cur.* Defendant cannot take advantage of this matter by writ of error, and if he could it would be unreasonable to keep him in custody till the determination thereof. *Walker v. Harges*, Bar. 413.

So was a *fieri facias* quashed for same reason. *Furtado v. Miller*, Bar. 213.

If tested out of
term, void.

If a writ of execution bear *teste* out of term, it is void; but the sheriff is justifiable, and yet shall not be liable to an action for an escape. Sal. 700. *Shirley v. Wright*.

If *capias satisfa-*
ciendum re-
turnable out of
term, only void-
able.

A *capias satisfaciendum* made returnable at a day which falls out of term would not be void, though liable to be set aside on motion; nor can such a defect in it be taken advantage of by bail upon a general demurrer to a *seire facias* brought against them. *Campbell v. Cumming*, Bar. 1187.

How alias writs
to be tested.

In all continued writs, the *alias* must be tested the day the former writ was returnable. *Touchin's case*, Sal. 699.

Writ of execu-
tion returnable
two terms from
the *teste* is well,
not so in mesne
process.

In mesne process, if a term be omitted, the writ is void in all actions per *jur.* and the sheriff shall not be charged, for the cause is discontinued and out of court by the intermission; and by not having a day in court by the return of the writ as he

he ought, the party may be at great prejudice by reason of the imprisonment in the mean time. But in *executions*, a *capias satisfaciendum* omitting a term is not void, for the party is not to have a day in court, his cause is at an end, and he must be in prison whether the writ be returned or not; nor is it necessary it should be returned. *Shirley v. Wright*, Sal. 700. Ld. Ray. 775.

If a *capias satisfaciendum* is returnable pending a writ of error, it is no regular foundation for proceeding against the bail. *Derisley v. Deland*, Bar. 83.

A writ of execution executed may be amended by the record of the judgment; as where after a *capias satisfaciendum* executed, it was moved to amend the writ by the record of the judgment, making the defendant's name *Edmund* instead of *Edward*, and rule afterwards made absolute. *Brown v. Hammond*, Bar. 10.

So a *capias satisfaciendum* may be amended in the return after it has been executed, by making it returnable *before our justices*, instead of *before us*. *Hunt v. Kendrick*, 2 Blac. Rep. 836. The way to amend it is by motion to amend it by the award of the writ upon the roll.

A writ of *capias satisfaciendum* was amended after defendant taken in execution by altering the sum in the writ, and striking out part to which he was not liable. *Larouche v. Wasbrough*, 2 D. & E. 737.

Motion to quash *capias satisfaciendum* and discharge defendants, because judgment is upon a record in Wilts, and *capias satisfaciendum* directed to London, and no *testatum*. It was acknowledged, that a *testatum* was the usual course, but that there was no occasion to insert it in the writ, though it must appear in the record, and when that is made up, proceedings will be regular; but the court was of opinion that the writ must be quashed with costs, no roll being yet made up to amend by, and defendant was discharged, undertaking to bring no action. *Allen v. Allen*, Blac. 694. B. R.

Ca. sa. to fix bail must not be returnable pending error.

How writs of execution may be amended; and by what.

There must be something to amend by.

(E) Of the Mode of executing the several Writs.

(E)

(E. 1) Of *Capias ad satisfaciendum*.

(E. 2) Of *Fieri Facias*.

(E. 3) Of *Elegit*.

(E. 1) Of executing the *Capias ad satisfaciendum*.

(E. 1)

The first species of execution is by *capias ad satisfaciendum*, which is a writ of the highest nature, inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded;

Capias satisfaciendum, the highest writ of execution.

awarded; and therefore when a man is once taken in execution by the sheriff on this writ, no other process can be sued against his lands or goods, except by stat. 21 Jac. 1. c. 24. in case of defendant's death.

Operation of writ:

By this writ the sheriff is directed to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff a satisfaction for his demand; and if he does not then make satisfaction, he must remain in custody till he does.

how sheriff must act thereon;

On the writ of *capias ad satisfaciendum* the sheriff cannot take bail, nor can he return that the party was rescued, for he may take the *posse comitatus*; and therefore if he returns that the party was rescued, an action lies against him for the escape, or a new *capias* against the party, for an ineffectual execution is as none. 2 Blac. Abr. 351.

and keep defendant in close custody.

When the defendant is once in custody upon this process, he is to be kept *in arcta & salva custodia*; and if he be afterwards seen at large, it is an escape, and the plaintiff may have an action thereupon for his whole debt. For, though upon arrests, and what is called mesne process, being such as intervenes between the commencement and end of a suit, the sheriff, till the statute 8 & 9 W. 3. c. 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ; yet, upon a taking in execution, he could never give any indulgence, for in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor.

How, if *capias satisfaciendum* be against several.

If a *capias satisfaciendum* be against two or more, the sheriff may take the bodies of all in execution. 5 Rep. 86. 11 Rep. *Godfrey's case*.

Sheriff must not break defendant's house open to take him,

On this writ, the sheriff may not break open any man's house to arrest him, but in all cases when the door is open he may enter to make execution of the body. But yet, in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, the general case is excepted: When the writ is at the suit of the king, then the sheriff or his officer, after request to have the door opened and refusal, may break open the house to take the body. 5 Co. 91. 2 Show. 87. pl. 78. But he ought first to signify the cause of his coming, and request the owners to open the door. 5 Co. 91. Cro. Eliz. 908. 4 Leon. 41. pl. 111. Cro. Eliz. 909. *Ibid*. 714. pl. 17.

except at the king's suit;

but he may break another man's, if defendant hid there.

But a man's house is no protection for another, therefore the sheriff may break it open to take him. Fof. Cr. L. 319.

In debt on a judgment, the defendant pleaded that he was taken in execution by *capias satisfaciendum* on that judgment, and had paid the money to the sheriff; and it was held to be no plea, because, though he does pay it to the sheriff, yet the sheriff may be insolvent, or may die and leave no assets, and then the party will be never the better. *Freem. Rep. 842.* And so it was held in Baker's case, who pleaded payment to the marshal being in execution, and held to be no plea. *Lutw. 587. 12 Mod. 385.* And in *12 Mod. 230.* the sheriff hath no power to receive money of the defendant upon a *capias*, for his business is only to execute his writ. And if in such case the defendant pays the sheriff, and he afterwards becomes insolvent, and does not pay the plaintiff, such payment shall not excuse the defendant. *Per Holt, C. J.*

Sheriff must not receive the money from defendant, but only take his body.

Payment to sheriff not good;

But payment to the plaintiff's attorney upon record would be good, for that is payment to the plaintiff himself. *Morton's case, 2 Show. 138.*

but otherwise to plaintiff's attorney.

Defendant, arrested by a *capias satisfaciendum*, paid the money to the sheriff's officers before the return. Defendant delivered to the sheriff a *feri facias* against the plaintiff, upon which the sheriff levied the sum therein expressed, out of the money in his hands, by the *capias satisfaciendum*, and upon being called upon to return the *capias satisfaciendum*, made the return thereof to the above effect, which the court held insufficient; and accordingly ordered him to pay the money paid to him upon the *capias satisfaciendum* to the plaintiff, deducting his poundage. *Staple v. Bird, Bar. 214.*

Sheriff cannot return that money was paid to him under *capias satisfaciendum*, and afterwards levied on another execution, whilst in his hands.

(E. 2) Of executing the *Fieri Facias*.

(E. 2)

The next species of execution is against the goods and chattels of the defendant, and is called a writ of *feri facias*, from the words in it where the sheriff is commanded *quod fieri faciat de bonis*, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered.

Fieri facias, why so called.

By a *feri facias* the sheriff may take all goods and chattels of the defendant which he might formerly take upon the *levari facias*; for the *feri facias* includes the *levari facias*. *2 Inst. 394.*

What may or may not be seized under a *feri facias*.

So he may take and sell an annuity of 40*l. per annum* granted by the king for years, to be paid by the receiver of the court, for it is in the nature of a rent-charge. *R. 2 Cro. 79.*

So he may extend or sell a term for years. *8 Co. 171. A.*

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How far sheriff,
on sale of a
term, can turn
tenant out of
possession.

So he may cut down and sell corn growing on the land, for the lessee has an interest in it. *Poole's case*, 1 Salk. 368.

So utensils for trade erected by the defendant, though fixed to the land, as coppers, fats, pavements, &c. *Ibid.*

And after sale, the defendant shall not have his term again, though the plaintiff be satisfied his debt by the profits. *Mo. 873.*

So if goods are taken in execution at the suit of B., and the sheriff returns *nulla bona*, they shall be afterwards taken at the suit of C.; for the property is not vested in B. nor in the sheriff. *Underwood v. Mordant*, 2 Ver. 238.

But the sheriff, upon a *fieri facias*, cannot take things fixed to the freehold, as doors, windows, &c. *Com. Dig. tit. Execution.*

Nor furnaces, coppers, &c. fixed. *Dub. 1 Rol. 891. l. 50. R. cont. 1 Salk. 368.* if erected by the defendant for the use of his trade. *Vide supra.*

Nor hearths, chimney-pieces, &c. put up by the defendant for the use of the house, and not for his trade. 1 Sal. 368.

So the sheriff cannot take goods in pledge. *Com. Dig. tit. Execution (C. 3).*

Or demised to another. *Ibid.*

Nor goods taken and in custody of the sheriff upon a former execution. *Bachurst v. Clinkard*, Show. Rep. 173. *Letchmere v. Thorowgood*, 3 Mod. 236.

Nothing can be taken in execution that cannot be sold, as deeds, writings, &c. *Francis v. Nash*, Cases temp. Hardw. 53.

Bank notes, &c. cannot be taken in execution. *Ibid.*

It is laid down, in *the King v. Deane*, 2 Show. 88. that if a sheriff on a *fieri facias* sell a lease or term of a house, he cannot and must not put the person out of possession, and the vendee in, but the vendee must bring his ejectment. But this, perhaps, may not be so settled a point as to extend to all cases; for *per* Mr. Justice Buller, in the case of *Taylor and Cole*, 3 D. & E. 298. "It seems to me, that where there is a tenant in possession, and the execution is against the landlord whose term is to be sold, the tenant cannot be turned out of possession; but that is very different from the case where the debtor himself is in possession; in such case, I incline to think that the sheriff may turn him out of possession. However, I give no opinion on that at present, because it is not necessary to the decision of this case."

If

If a plaintiff cannot find sufficient effects of the defendant to satisfy his judgment, the court will order the sheriff to retain, for the use of the plaintiff, money which he has levied in another action at the suit of the defendant. *Armistead v. Philpot*, Do. 231.

Money levied by sheriff for defendant may be sometimes retained for plaintiff.

The sheriff is bound at his peril to take only the goods of the defendant; for, if he take goods of a stranger, he is liable to an action in trover or trespass. *Keb. 693*. Therefore, if he doubts whether the goods shewn him are the defendant's, he may summon a jury *de bene esse* to satisfy himself whether the goods belong to the defendant or not; this will justify him in returning, that the defendant has no goods within his bailiwick, and mitigates damages in an action of trespass, if the goods seized should not happen to be the defendant's. *Dalt. 146. Do. 40.*

Sheriff must be cautious to take the goods of the right person;

This proceeding by the sheriff is a kind of inquest of office; it is merely to indemnify the sheriff in making his return to the writ; but it does not bind the right between the litigating parties. The court therefore will not interfere by setting aside such inquisition. *Roberts v. Thomas*, 6 D. & E. 88.

If on a *fieri facias* against A. a bailiff takes the goods of B., trespass lies against the sheriff. *Ackworth v. Kempe*, Do. 40.

Trespass will lie against the high sheriff for the bailiff's taking the goods of A. instead of B. under a *fieri facias*. *Sanderson v. Baker*, Blac. 832. S. C. 3 Wil. 309.

otherwise liable to an action.

If the sheriff have a *fieri facias* against a man's goods, and before execution he pay him the money, in this case he cannot do execution after; and if he do, trespass lies: nor can he deliver them to the plaintiff in satisfaction of the debt, but he must return to the court the execution of his writ. *Cro. Eliz. 504. Noy, 56. Dalt. 529.*

On fieri facias defendant may pay sheriff the money;

If the defendant tenders the debt, it is a wrong for the sheriff to sell the goods. 1 *Keb. 655*.

If the sheriff levy the money and give it to the plaintiff, though he never made any return to the court, it is good enough, 4 *Rep. 64.*, for the end of the execution is answered.

or tender it;

Payment to a sheriff on a *fieri facias* is a good plea, because he hath authority to levy the debt. 2 *Lev. 203. Taylor v. Bekon*. 2 *Jon. 97. Skin. 665. 5 Mod. 296.*

and such payment is a good plea.

Sheriff on a *fieri facias* levied the debt; the defendant brought a bill in Chancery, and got an injunction to stay the money in the sheriff's hands; the plaintiff and his attorney (both prisoners in the Fleet) moved the court against the sheriff to return the writ; the sheriff prayed the direction

Though sheriff receives injunction from Chancery to retain the money levied, he must still return the writ.

of the court; for if he return the writ he must pay the money, and then he shall be committed by the Chancery for breach of injunction; and if not, then the K. B. will amerse him. The court took no notice, but ordered a return, or they would commit him; nor would they any way assist him. 8 Mod. 315. *Wilson v. Aldridge*.

From what time goods bound.

Formerly from teste of writ;

not from judgment;

but this introduced abuses;

to prevent which, by stat. 29 Car. 2. c. 3. goods now bound from delivery of writ to sheriff.

But this is only intended as to strangers.

If two writs of same date be delivered, which is to be executed first?

This writ, at the common law, bound the defendant's goods from the *teste* of the writ; so that any sale after that was void, because the goods from the time of the *teste* were attendant to answer the execution; for the execution at common law being only the goods, if they had not allowed the goods to be bound, as if the party had transferred them, they thought every execution might be avoided by sale; and it was presumed, that the sheriff should execute such writs immediately, and that there would be notice in the neighbourhood, that they might not be deceived; but the goods were not bound by the judgment, because the judgment was in force for a whole year; and it would be hard that none against whom judgment was pronounced, should buy or sell within that time: but men abused the notion of the retrospect of the goods being bound by the *teste* of the writ to make sales uncertain, for they took out writs one under the other without delivering them to the sheriff; by which they bound the goods of their debtors, and consequently made their sales and commerce uncertain: To prevent which, the statute of frauds and perjuries binds the goods only from the delivery of the writs to the sheriff, enacting, "That no writ of execution shall bind the property of the goods but from the time of its delivery to the sheriff, under-sheriff, or coroners; who, upon receipt thereof, (without fee,) shall indorse on the back thereof the day of the month and year when they received it;" 29 Car. 2. c. 3., made perpetual by 1 Jac. c. 17. s. 5.; which was no more than restoring the old law, which supposed the writ to be delivered to the sheriff immediately from the *teste*. 8 Co. 171. Cro. Jac. 451. Cro. Eliz. 174. Sid. 271.

This must be intended as to strangers who might have a title to the goods between the *teste* of the writ and delivery thereof to the sheriff; but as to the party himself, his executors and administrators, the goods, since the statute as before, are bound from the *teste*. 2 Vent. 218. Comb. 33. 2 Show. 485. 6 Mod. 225.

If two writs of *feri facias* bear *teste* the same day, the sheriff at common law, and now, since the statute, is bound to execute that which was first delivered to him; Salk. 320. Carth.

Carth. 419.; therefore the time ought to be marked when the sheriff receives those writs in office.

Where two writs of *fiery facias* against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution; and if the person claiming under the second execution pay the sheriff the amount of the debt under the first execution for his security, the court will not compel the sheriff to refund that money on motion. *Hutchinson v. Johnston*, 1 D. & E. 729.

In an action against the sheriff for a false return to a *fiery facias*, the plaintiff delivered a writ of execution to the sheriff, under which his officer levied the debt, and made a bill of sale; then the sheriff discovered a former execution in the office, and returned *nulla bona*: on this case the defendant obtained a verdict. *Rybot v. Peckham*, 1 D. & E. 731. n.

The property of the goods is vested by the delivery of the *fiery facias*, and an extent afterwards for the king comes too late, and that on the statute of frauds, Comb. 123.; for when a judgment is once executed, the goods are *in custodia legis*, and neither exchequer-process or assignment from commissioners of bankrupts will touch them. *Letchmere v. Thorowgood*, 3 Mod. 236.

If goods be taken in execution on a *fiery facias* against the king's debtor, and before they are sold an extent come at the king's suit, grounded on a bond debt tested after the delivery of the *fiery facias* to the sheriff, these goods cannot be taken upon the extent. *Rorke v. Dayrell*, 4 D. & E. 402. Do. 415. Ray. 307.

Under particular circumstances and in special cases (but not as a general rule) the court will interfere in favour of the sheriff so far as to enlarge the time upon his own application for his making a return to a writ of *fiery facias*, when there is a reasonable doubt whether the goods seized are not covered by an extent issued since the *fiery facias*. *Wells v. Pickman*, 7 D. & E. 174.

An extent cannot be antedated, but must bear *teste* at the day it issues, though it be out of term. *Rex v. Mann*, Str. 749.

If A. indebted to B. and C., after being sued to judgment and execution by B., go to C. and voluntarily give him a warrant of attorney to confess judgment; on which judgment is immediately entered, and execution levied on the same day on which B. would have been entitled to execution, and had threatened to sue it out; the preference so given by A. to C. is not unlawful nor fraudulent within the meaning

An extent too late after delivery of *fiery facias*.

An extent cannot be antedated.

Of fraudulent executions by giving preference, and the like, and of the effect thereof.

ing of the stat. 13 El. c. 5. *Holbird v. Anderson*, 5 D. & E. 235.

A first *fieri facias* executed fraudulently, a second *fieri facias*, at the suit of another, executed afterwards shall stand and be preferred; and the matter was properly left to a jury. *Bradley v. Wyndham*, Wil. 44.

Of the power of
sheriff in mak-
ing execution
under *fieri fa-
cias*;
as to breaking
open chests, &c.

By this writ the sheriff is commanded to levy the debt of the goods and chattels of the defendant; and he is therefore indemnified as far as he acts necessarily in order to the taking of the goods; and therefore if he breaks open a chest in which goods are locked up, or a barn not adjoining to a dwelling-house, which is made for the conservation of goods only, he is indemnified by the writ; but he is not by the writ authorized to break the dwelling-house, which is built for the protection of the man and his family, Sid. 189. Keb. 698. 2 Show. 87. Palm. 54. If he gets into the house, the doors being open, there begins the execution; for the rest of the house is only for the protection of the goods, and therefore he may enter and finish the execution of his writ. But though the sheriff be a trespasser in the execution of the process, yet when the writ is served and the money levied, the plaintiff shall have the benefit of it, and the party is left to his remedy against the sheriff. Browne, 50.; 5 Co. 91.; 3 Inst. 162.; Mod. 668.; Yelv. 28.; Cro. Eliz. 908.; Dalt. 350. But the protection of a man's house, as before hath been said, extends only to himself and family; for if a stranger, to elude the execution, receives the defendant's goods into his house, the sheriff's authority shall reach them; because a design to elude the law shall not be protected by the law; the sheriff might seize him in the stranger's house, because the defendant's leaving his own house has waived the benefit of the law. 5 Co. 93.; Sid. 186. The protection of a man in his own house was very agreeable to the ancient law, because in personal contracts they did only subject their chattels and not their persons nor freeholds; and though afterwards, by subsequent laws, the freehold and person were made liable to execution, yet they have not taken away the privilege a man had by common law to defend his own house, which still continues, unless where the execution is by *habere facias seisinam* or *possessionem*.

breaking open
houses to get at
goods;

only protected
in a man's own
house.

What property
in the goods is
vested in sheriff
by the seizure.

By virtue of this writ, the sheriff, on the seizure of the goods, hath such a property in them, that he can maintain trespass or trover; for he has the goods to sell that he may have the money in court; and therefore when he once seizes them, he has the property in them for that purpose. Sid. 438. pl. 3.; Vent. 52, 53.; Mod. 30. pl. 75.; 2 Saund. 47.; Lev.

Lev. 282. 2 Vent. 218. Salk. 222. Vent. 52. And if the defendant dies after the writ delivered to the sheriff, he may execute the same on the goods in the hands of the executor or administrator of the deceased; 3 Wilk. 399; Comb. 33; 2 Ld. Raym. 808. 850. 1073.; 12 Mod. 130. 241.; because the sheriff was entitled to seize them from the time of the writ.

How he may execute writ if defendant dies.

The sheriff that begun the execution shall end it, though he is out of office. Salk. 323.

Same sheriff who begun shall finish execution.

If plaintiff dies, execution does not abate; but sheriff must go on to execute his writ. Salk. 322. 6 Mod. 290.

It does not abate by plaintiff's death.

So if defendant dies at any time subsequent to the day to which the judgment has relation, though prior to the actual day when such judgment was signed, execution may go against his goods without a *scire facias*. Thus where a judgment is signed in any part of the term or the subsequent vacation, it relates back to the first day of the term, and notwithstanding the death of the defendant before judgment actually signed, execution will be good tested the first day of the term. *Bragner v. Langmead*, 7 D. & E. 20. But if the execution bears *teste* posterior to defendant's death, it is irregular. *Ibid.* *Heapy v. Parris*, 6 D. & E. 368.

When a sheriff takes goods in execution, he may sell them at any rate, if defendant refuses to pay the debt; Vent. 7.; and they may be sold to the plaintiff, though not actually delivered to him. Comb. 452. But he is to sell them for ready money, because he is immediately charged to the party for whom the sale was. 6 Mod. 83. *Morley v. Staker*.

Of sheriff's authority as to selling the goods, and how he ought to act therein;

The sheriff cannot detain the goods on an execution in his own hands, and satisfy the debt of his proper money; but he ought to sell them upon a *venditioni exponas*, and may return, on his so doing, that they remain in his hands for want of buyers; for the law requires of sheriffs a strict execution and observance of the writs directed to them. Noy. 107. Lutw. 589. *Langdon v. Wallis*. Neither ought the goods to be delivered to the plaintiff in satisfaction of his debt, but ought to be sold. 2 Vent. 95.

must sell them, or attempt so to do; cannot keep them himself,

If the sheriff returns that he has goods to the value of 72*l.* which remain in his hands for want of buyers, it is no estoppel, but that he may sell them for less; for it appearing on the return that they are not sold, but that they remain in specie in his hands, the value cannot be so set, but that it may be altered between that and the sale; therefore if on the *venditioni exponas* it appears that he has sold those goods for less, the plaintiff may have a new execution for his debt.

or let plaintiff have them.

If he returns that goods remain in his hands, &c. to a certain value, he may afterwards sell them for less;

Cro. Eliz. 598. Cro. Jac. 515. Godb. 276.

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but he must not value them too high.

No appraisement on fieri facias.

If he levies more than debt, he may keep for plus till demanded.

An action of debt or assumpsit lies against sheriff for money levied.

What returns sheriff may make to fieri facias, nulla bona, &c.

That goods remain in his hands for want of buyers.

Sheriff compelled to sell by venditioni exponas;

need not make bill of sale at appraised value.

Sheriff answerable for returned value.

How, if sheriff goes out of office before goods sold.

Yet if the sheriff values them so high as none will buy them at that rate, he must take them himself. 2 Show. 89. *The King v. Bird.*

On a *feri facias* there need no appraisement, but on an *elegit* there must. *Beeley v. Sampson*, 2 Vent. 95.

If *feri facias* be awarded to the sheriff to levy 20*l.* and he sells to the value of 40*l.* and returns the *feri facias* with 20*l.* in court, he may detain the surplussage until demand made of it; for he is not bound to search out the defendant. Noy. 69. He ought not to take more than will satisfy. *Ibid.*

If the sheriff levies the money upon a *feri facias*, though he makes no return upon the writ, yet an action of debt, account, or *assumpsit* lies against him and his executors, because it is a debt in the sheriff by the levying the money; and the defendant, by the sheriff's levying the money upon him, can, on a *scire facias* to have execution, plead this in bar, or upon a second *feri facias*, relieve himself by an *audita querela*; for the lien of the judgment is discharged by the sheriff's executing the writ, and if the plaintiff had not this action against the sheriff, he would be remediless. Sir W. Jones, 430. Rol. Abr. 598. 921.

The sheriff to this writ may return *nulla bona*, and that the defendant is a beneficed clerk, having no lay fee, and that he is rector or vicar of the parish church of B. Offic. Brev. 97. Dalt. 219. Sid. 278.

The sheriff may return on this writ, that the goods remained in his hands for want of buyers, and this return is good, because the sheriff is directed to levy the money from the goods, which implies an authority to sell them; yet he may not be able to find buyers, and therefore, such return is to be allowed. Yelv. 44. Sid. 438. 2 Saund. 47. Mod. 751. Vent. 52.

If the sheriff delays or refuses to sell, the legal and proper mode of compelling a sale is by writ of *venditioni exponas*, upon which he must return the money into court. *Cameron v. Reynolds*, Cowp. 406.

The sheriff is not obliged to execute a bill of sale at an appraised value, though he has even promised so to do. *Ibid.*

The sheriff is bound for the returned cost or value of the goods, though they are afterwards rescued. Ld. Ray. 1075.

It was formerly held, that if a sheriff takes goods in execution by virtue of a *feri facias*, and is out of office before they are sold, that in such case he could not sell and deliver the money to the party, because his authority determined with his office; but that he ought to deliver such money over

over to the new sheriff (as he doth the prisoners), and return, that thereupon a *venditioni exponas* may be awarded to the new sheriff. But since it hath been held, that though a new sheriff is made, yet the old may sell the goods so by him levied; but if he return the writ, that the goods are in his hands *pro defectu emptorum*, in such case a *distingas* shall go to him, to deliver them over to the new sheriff, and after that a *venditioni exponas*. 3 Salk. 323. It seems that a sheriff may sell goods after he is out of office, without a *venditioni exponas*. Ld. Ray. 1073.

But where a *feri facias* comes to a sheriff, and he goes out of office before it is executed, his successor may execute it, because such writ is general, and not directed to any particular sheriff by name; but it is otherwise, if directed to a sheriff by name. So note the difference between general writs to the sheriff, and special writs to a sheriff by name. 3 Salk. 147.

Where a person, against whom a writ of *feri facias* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable from thenceforth, the sheriff is warranted in returning *nulla bona*, if it appear that the memorial of such annuity was not registered according to the directions of the annuity act, 17 G. 3. c. 26. s. 1. for in that case the deed is absolutely void. *Croftley v. Arkwright*, 2 D. & E. 603.

Sheriff may return *nulla bona*, if property were an annuity not properly registered.

The court will not stay goods taken by *feri facias* in the hands of the sheriff, till a dispute concerning the property of them is decided, unless for the protection and at the request of the sheriff. *Shaw v. Tunbridge*, Blac. 1064.

When court will stay goods in sheriff's hands till dispute decided.

When the defendant's goods are seized on a *feri facias*, the debt is discharged. *Ibid*.

(E. 3) Of executing the Elegit.

(E. 3)

At common law, there was no execution which gave possession of the lands of a debtor; the only satisfaction was either against his goods and chattels by *feri facias*, or against the rent and profits of the land by *levari facias*. But by the 13 Edw. 1. c. 18. it was ordained, "That where a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the election of him that sueth to have a *feri facias* unto the sheriff to levy the debt upon the lands and chattels of the debtor, or that the sheriff shall deliver to him all the chattels of the debtor (saving his oxen and beasts of his plough) and the one-half of the land, until the debt be levied upon a reasonable price or extent; and if he be put out of the land, he shall recover it again by writ of *novel seisin*, and after that by writ of *redisseisin*, if need be."

Introduction of elegit;

M m 2

From

Why so called; From this *election*, which the party has, the writ of *elegit* derives its name; and the entry is *Quod elegit sibi executionem fieri de omnibus catallis & medietate terra.*

how sheriff to act thereon; Upon this writ the sheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same; and also to inquire as to his lands and tenements: And upon such inquisition, the sheriff is to deliver all the goods and chattels (except the beasts of the plough), and the moiety of the lands to the party, and must return his writ, in order to record such inquisition in that court out of which the *elegit* issued.

must take an inquest. And this cannot be done by the sheriff without an inquest; for the words of the statute are, "upon a reasonable price or extent," which must be found such by the oaths of twelve men, as is laid down and admitted by all the books which treat of this subject. 2 Inst. 396. Co. Lit. 389. Dy. 100. 5 Co. 74.

How moiety of lands to be set out and delivered; When the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set and deliver a moiety there of to the plaintiff by metes and bounds, not an undivided moiety. *Sparrow and Matterfack*, Cro. Car. 314.

If, therefore, upon an *elegit* the sheriff delivereth a moiety of an house without metes and bounds, such return is ill, and shall be quashed for uncertainty. *Carth. 453. Pullen v. Birbeck.*

But if there be several closes, or manors, or farms, or tenements, the sheriff is not bound to deliver a moiety of every particular close, or farm, or manor, or the like, but only certain tenements, making in value a moiety of the whole. *Den v. The Earl of Abingdon*, Do. 473.

But the sheriff ought to deliver a moiety only, for if he delivers more, it will be void, and plaintiff shall have a new execution. *Ld. Ray. 718. Pullen v. Birbeck. Berry v. Wheeler*, 1 Sid. 91. *Earl of Stamford v. Hobart*, *Ibid.* 239. 2 Salk. 564. *Putten v. Purbeck.*

Inquisition must be certain, &c. The inquisition ought to find the lands with certainty, and to shew the place and county where they lie, and where the inquisition is taken. *Dyer, 208.* And if the defendant be joint tenant, or tenant in common, it ought to be mentioned in the return. *Hut. 16. Brownl. 38.*

Sheriff cannot give possession, but ejectment must be brought. The sheriff cannot give actual possession of lands on an *elegit*, but only deliver seisure, to enable the plaintiff to maintain an ejectment, whereby he may get into possession. *Jefferson v. Dawson*, 3 Keb. 243. *Den, Lessee of Taylor, v. The Earl of Abingdon*, Do. 473.

If sufficient goods, lands must not be taken. But it is to be observed, that although by this statute the lands of a debtor are made liable, as well as his personal estate,

estate, yet if the creditor takes out an *elegit*, and it appears to the sheriff that there are goods and chattels sufficient of the debtor's to satisfy the debt, he ought not to extend the lands. 2 Inst. 395.

But an *elegit* executed upon goods only is not in effect as a *fiery facias*, for the *fiery facias* is executed by sale by the sheriff, but an *elegit* by the appraisement of the goods by a jury and delivery to the party. *Glascock v. Morgan*, Sid. 184. Lev. 92. Keb. 105. 261. 465. *Pullen v. Birbeck*, Ray. 718.

If, therefore, a writ of error be afterwards brought, and the judgment reversed, the goods in *specie* shall be restored, and not the value; but upon a *fiery facias*, the value, and not the goods, in *specie*. *Glascock v. Morgan*, Lev. 92. 5 Co. 90. *Goodyere v. Ince*, Cro. Jac. 246.

The sheriff cannot deliver a lease upon an *elegit* at another value than what the jury had found it at; and the sale made by him is as good as if made in market overt. Brownl. 38.

When the inquisition is taken by the sheriff, it shall be returned and filed. Dy. 100.

And it shall not afterwards be avoided upon any surmise of more than a moiety having been extended, or that it was extended, or at an under-value. 2 Inst. 396. 2 Chan. Caf. 183.

But, before the filing thereof, court may examine it; and if they find fraud, partiality, or the like, may stop the filing and award a new *elegit*. 2 Inst. 396.

Generally speaking, all tenements as well as lands of defendant may be extended on an *elegit*, as a rent or rent-charge, or the like. *Wootton v. Shirt*, Cro. Eliz. 742. Moor, 32.

So a term for years, 2 Inst. 398.; or it may be sold as goods, for it is personalty; but if extended, there shall be no other benefit than as a common extent. 1 Brownl. 38. *Fleetwood's case*, 8 Co. 171. So lands in ancient demesne, Hob. 47.; or before in execution upon a statute, *Fulwood's case*, 4 Co. 65.; or which are liable to incumbrances by *cestui que trusts*. Stat. 25 C. 2. c. 3. f. 10.

But not copyhold lands, 1 Roll. 888. 1.; nor a term for years of copyhold lands made by the licence of the lord, *Ibid.*; nor a bare rent seck, Cro. Eliz. 66. *Walsal v. Heath*; *Heydon's case*, 3 Co. 9.; nor the glebe lands of a parson or vicar, Jenk. 207.; nor a tenement which cannot be granted over, as the office of a filazer, being an office of trust. Dy. 6, 7.

If A. and B. recover several judgments against C., and A. sues out an *elegit*, and has a moiety of C.'s lands delivered to him, and then B. sues out an *elegit*, the sheriff can only extend a moiety of the remaining lands. *Huit v. Cogan*, Cro. Eliz. 483.

But if A. has two judgments against C., and in the same term takes out two *elegits*; on the one he may have a moiety of the whole, and on the other the other moiety, and is not restrained

Difference between *elegit* and *fiery facias* as to goods.

and in their operation.

Sheriff must abide by valuation of jury.

Inquisition must be returned and filed; not easily avoided afterwards;

but court will inquire into it.

What may be extended on an *elegit*;

not copyhold lands, &c.

How sheriff to execute different *elegits* sued out.

How, if at suit of same plaintiff.

restrained on the latter to a moiety of the moiety; for in judgment of law the whole term is but one day. *The Attorney General v. Andrew*, Hard. 23.

How, if fieri
facias delivered
at same time.

If a *fieri facias* and *elegit* be delivered at the same time with an extent at a common person's suit, the *fieri facias* and *elegit* shall take place, because the goods shall be attendant to satisfy, in the first place, the judgment of the superior court. Brok. 97. 1 Brown. 38.

(E)

(F) Of the Lien for Rent upon Goods taken in Execution.

This lien creat-
ed by statute
8 Ann. c. 14.

only for one
year's rent.

only for one
year's rent.

Different deci-
sions on statute;
as to notice;
to what rent
entitled;
not extend to
ground land-
lord.

That action lies
by executor of
landlord for it.

By the 8 Ann. c. 14. "No goods or chattels whatsoever, lying or being in and upon any messuage, lands, or tenements which shall be leased for life, years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the execution is sued shall, before the removal of such goods from off the said premises by virtue of execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of taking such goods or chattels by virtue of such execution, *provided the said arrears of rent do not amount to more than one year's rent*; and in case the said arrears shall exceed one year's rent, then the said party at whose suit the said execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution-money."

It has been adjudged, 1st, That there must be a demand made, and notice given to the sheriff by the landlord, before removal of the goods, or an action will not lie for him; Str. 97. *Waring v. Dewbery*: 2d, That the landlord is entitled to his whole rent without deduction of poundage; Str. 643. *Gore v. Goston*: 3d, That a ground landlord, where there is an execution against the under-lessee, is not within the act; Str. 787. *Bennet's case*: 4th, That after a landlord has had one year's rent paid, and there comes in another execution, he shall not have another year's rent paid; Str. 1024. *Dodd v. Sanby*: and 5th, That an action lies upon it by an executor or an administrator of landlord against a bailiff or sheriff for removing the goods off the premises, after notice, before the landlord was paid his year's rent. *Palgrave v. Wyndham*, Str. 212.

But

But where goods were taken, and the money levied before administration taken out, it was held, that as the execution was executed he came too late; Str. 97. 214. Fortesc. Rep. 460.; this means that the goods were actually sold. But Powis, Justice, seemed to be of opinion to the contrary, who held, that the administration should have relation to the death of the intestate, because by the ecclesiastical law it is not to be granted within fourteen days of an intestate's death; which the other justices denied, and said, that relations, being fictitious, ought not to hold place against the right of strangers. Gilb. Eq. Rep. 223, 224.

When too late for lien to operate.

If the goods seized are not removed or sold by the sheriff so as to transfer the property therein, but defendant pays the debt, though the landlord has given notice and demanded rent, yet he is not entitled in such case.

Landlord not entitled if defendant pays debt, and goods not seized.

Upon the equity of this statute it hath been held, that under a commission of bankrupt, which is in the nature of a statute execution, the landlord shall be allowed his arrears of rent to the same amount in preference to other creditors, even though he hath neglected to distrain while the goods remained on the premises, which he is otherwise entitled to do for his entire rent, be the *quantum* what it may. 1 Atk. 103.

Upon the equity of the statute, same lien allowed under command of bankrupt.

A bill of sale held to be a removal of goods taken by a *feri facias*, and a year's rent must be paid the landlord out of the money levied by the sheriff. *West v. Hedges*, Bar. 211.

So allowed under a bill of sale.

Instead of bringing an action against the sheriff, &c. when the goods are sold after notice, the best way for the landlord is to move the court, that he may have restitution to the amount of the goods which the sheriff has sold, if they amount to less than a year's rent; or if they amount to more, to have so much as will satisfy a year's rent.

What best remedy for landlord in this case.

Motion to have rent paid to the landlord out of the money levied. On shewing cause it appeared, that the sheriff's warrant on the execution, after it was sealed, had been altered, and a new bailiff's name inserted. *Per. cur.* The warrant being altered, no goods are taken in execution thereby. Let the bailiff and attorney, privy to the alteration, shew cause why an attachment should not issue against them. *Hann v. Capel*, Bar. 199.

How if sheriff's warrant altered.

In an action against the sheriff for taking goods without leaving a year's rent, the declaration needs not state all the particulars of the demise; but if it does, and they are not proved as stated, there shall be a nonsuit. *Brissow v. Wright*, Do. 665.

What declaration need state in an action against the sheriff in this case.

If an extent comes in, the landlord cannot claim his rent, although distress taken the day before. *Bunb.* 269. pl. 345.; so an extent or an outlawry, although he had distrained three

How landlord's claim affected by extent.

or distress.

How extent
shall prevail
against a dis-
tress.

(G) Of
When a second
writ may issue;

but the first writ
should be re-
turned.

After a *ca. sa.*
there can be no
feri facias or
elegit;

except in case
of defendant's
death.

So if lands ex-
tended on ele-
git, no other
writ afterwards;
but if only goods
levied, a *ca. sa.*
or *fi. fa.* may go.

days previous to the entry and motion to be paid, under stat. 8 Ann. denied. Bunb. 5. pl. 5. If a distress be taken 29th October, and an extent dated 4th November, and corn, &c. seized, the landlord cannot have his rent, for no property was divested by the distress, and they were in the landlord's hands by way of pledge; Bunb. 42. Vent. 37. 2 Saund. 47.; but an attachment was refused, although a contempt to oppose the extent.

An immediate extent against the king's debtor tested after a distress for rent justly due to the landlord, with notice to the tenant, being the king's debtor, and appraisement of the goods and chattels, but before sale, shall prevail against the distress. *The King v. Cotton*, Esq. Parker's Rep. 112.

(G) Of issuing a second Writ of Execution, and of retaking Defendant after his Escape or Discharge.

There ought not to be two executions existing at the same time; but if one writ proves ineffectual another may be sued out.

Thus if a *feri facias* be issued, and the sheriff only levies part of the debt or damages recovered, the party may have either a *capias ad satisfaciendum*, or another *feri facias*, or an *elegit* for the residue.

In such case the sheriff should return the first *feri facias* and the levy thereon, which ought to be recited in the *ca. sa.* Salk. 218. Cro. Eliz. 344.; but if nothing be levied on the *feri facias*, there is no necessity to recite the sheriff's return in the *ca. sa.*, or its having been issued.

But if a *capias ad satisfaciendum* first issue, and the body be taken, there cannot afterwards be a *feri facias* or *elegit*, for the body is deemed the highest satisfaction the plaintiff can have.

And by the common law, if defendant died in execution upon this writ, plaintiff had no further remedy; but now by stat. 21 Jac. 1. c. 24. plaintiff may after his death, sue out execution against his lands, goods, or chattels at his election.

So with respect to the *elegit*, if the lands are extended upon an *elegit*, the plaintiff is for ever barred from having another execution; but if he levies on the goods only, and the sheriff returns *nihil* as to the lands, a *ca. sa.* may issue for the residue, or a *feri facias*; for the election is not complete unless the plaintiff has some benefit from the land; for the taking out the writ is not an actual election, but only in order to an election: and if there be no lands there is nothing to choose, and consequently no election; and it was said, that an *elegit* where

where there are no lands, is but in effect a common *feri facias*. *Bacon v Peck*, Str. 226.

For the rule is, that although the body and goods may eventually be taken into execution, or land and goods, yet that the body and land too cannot, upon any judgment between subject and subject, by the course of the common law.

Rule in cases of execution.

In judgments upon a statute, &c. body, lands, and goods are rendered liable together. *Keb. 60.*

In the case of *Howell and Hanforth*, C. B. Blac. 845. the court inclined strongly to think, that though at common law if the sheriff only levies part of the debt on a *feri facias* marked for the whole, the plaintiff may have subsequent writs till the whole is levied; yet a plaintiff shall not mark it for part, and afterwards sue out subsequent writs for the residue, which would tend to great oppression.

If party escapes on *fi. fa.* only part levied; other writs may go; but plaintiff must not mark it for part only and then sue out other writs.

Instance of this in an annuity case.

The above was the case with an annuity-bond with warrant of attorney to confess judgment; on failure of a quarterly payment, judgment was entered up, and *feri facias* sued out, marked to levy only 20 *l.* (the quarterly payment); afterwards on failure of another payment, another *feri facias* was issued; but it was moved to set it aside on the ground of irregularity for want of a *scire facias* under stat. 8 & 4 W. 3. In which case the court pronounced this rule, "That on payment by the defendant of the arrears due on the annuity and costs, the *feri facias* be set aside; but the judgment to stand as a security for future arrears, with liberty to apply to the court from time to time to sue out fresh executions thereon." 2 Blac. 845.

Rule for taking out execution in judgment on annuity bond.

No second writ ought to issue before the return of the first. *Coppendale v. Debonaire*, Bar. 213. *Snape v. Hancock*, *Ibid.* 198.

First writ must be returned before second issues.

If a party taken on a *ca. sa.* escapes or is rescued, though the sheriff is hereby liable, because he ought to have taken the *posse comitatus*, yet the plaintiff shall not be compelled to take his remedy against the sheriff, but may sue out another *ca. sa.* or, if the first *capias* be not returned or filed, any other species of execution. Law of Exec. 117. Cro. Car. 40. 455.

If party escapes on *ca. sa.* another may issue.

If the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake him, nor take any of the others: for in a joint action against two, a separate *ca. sa.* against one defendant, cannot be supported. *Clark v. Clement and another*, 6 D. & E. 525. Nor does it make any difference, that such defendant promised to render himself. *Ibid.*

So

So committitur must be abandoned before a second is entered.

So plaintiff must give notice of his having abandoned a former *committitur* which is erroneous, before he enters a second, rectifying the mistake. *Topping v. Ryan*, 1 D. & E. 227.

(H)

(H) Of the Sheriff's Fees, Poundage, &c.

No fees at common law.

By the common law, no fees whatever were allowed to sheriffs; but this, instead of being advantageous to the subject, proved only oppressive; it opened the door to extortion; And to such an height did the evil gradually rise, that the legislature found it necessary to interfere, and to regulate the demands of sheriffs, by appointing certain fixed sums to be taken in cases of execution.

How introduced by statute.

29 Eliz. c. 4.

(a) It is said, that the printed statute book is wrong, and that by the parliament-roll, it is the 28th, and in an action reciting it as 28th, it was held well. Salk. 331. But it is usually brought as upon the 29th, 2 D. & E. 148. and held well. Blac. 3103.

The poundage allowed.

Penalty for offending against the statute.

Statute does not extend to towns corporate.

The first statute to this effect is the 29 (a) Eliz. c. 4, whereby it is enacted, "That it shall not be lawful to or for any sheriff, under-sheriff, bailiffs of franchises or liberties, nor for any of their or either of their officers, ministers, servants, bailiffs, or deputies, nor for any of them, by reason or colour of their or either of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods, or chattels of any person or persons whatsoever, more, or other consideration or recompence, than in this present act is and shall be limited and appointed (which shall be lawful to be had, received, and taken); that is to say, *twelve-pence of and for every twenty shillings, where the sum exceedeth not one hundred pounds, and six-pence of and for every twenty shillings being over and above the said sum of one hundred pounds that he or they shall so levy, or extend and deliver in execution, or take the body in execution, for by virtue and force of any such extent or execution whatsoever, upon pain and penalty that all and every sheriff, under-sheriff, bailiff of franchises and liberties, their and every of their ministers, servants, officers, bailiffs, or deputies, which at any time after the said first day of May now next ensuing, shall directly or indirectly do the contrary, shall lose and forfeit to the party grieved his treble damages, and shall forfeit the sum of forty pounds of good English money for every time, that he, they, or any of them shall do the contrary; the one moiety thereof to be to our sovereign Lady the Queen, her heirs and successors, and the other moiety thereof to the party or parties that will sue for the same by any plaint, action, suit, bill, or information, wherein no essoin, wager of law, or protection shall be allowed.*

"Provided always, that this act, or any thing therein contained, shall not extend to any fees to be taken or had for any

"any execution *within any city or town corporate* (a), any thing above-mentioned to the contrary thereof notwithstanding."

It was determined, that this statute did not extend to real execution, but only to executions in *personal* actions; and it was doubted whether the sheriff was entitled to any fees for executing an *elegit*, as it was difficult how to ascertain the fees. *Peacock v. Harris*, Salk. 332.

But by a subsequent statute of 3 Geo. 1. c. 15. s. 16. the fees for executing writs of *elegit*, and of *habere facias possessionem aut seisinam*, are regulated; viz. "The sum of twelve-pence for every twenty shillings of the yearly value of any manor, messuage, lands, tenements, and hereditaments whereof possession or seisin shall be given, where the whole exceedeth not the yearly value of one hundred pounds, and the sum of six-pence only for every twenty shillings per annum over and above the said yearly value of one hundred pounds."

And by the 8 Geo. 1. c. 25. s. 5. a like fee is given on executing an *extent* & *liberate*.

It was also resolved, that, by the 29 Eliz. c. 4., the sheriff, upon a *capias ad satisfaciendum*, was entitled to his fees upon the whole debt. *Peacock v. Harris*, Salk. 332.

But instead of taking poundage on the sum really due, sheriffs, in actions on judgments, statutes, and recognizances, and the like, used to retain for their fees poundage to the full amount of the sum for which such judgments or securities were given, and which poundage often far exceeded even the debt due to the plaintiff.

To remedy which, the 3 Geo. 1. c. 15. s. 17. after reciting the grievance, enacts, "That poundage shall not be taken for executing any *capias satisfaciendum* upon any judgment, &c. for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff amounts to, which sum the plaintiff is obliged to mark and specify on the back of the writ, before it be delivered to the sheriff: And, in case the sheriff shall take more, he is guilty of extortion; and for each offence shall forfeit to the party grieved treble damages, and double the sum so extorted, to be ordered by the court which issued the writ, in a summary way; and also 200 l., one-half to the king, the other to the prosecutor in any court at Westminster, provided such suit be commenced within two years."

The statute of 29 Eliz. c. 4. does not extend to the crown. *Lake v. Turner*, Burr. 1983. But it was held, that an action

Statute only extends to personal actions.

Qu. Whether it extended to elegits?

But by 3 G. 1. c. 15. fees are allowed for executing elegits.

and by 8 G. 1. c. 25. for executing extents.

By 29 Eliz. on ca. fa. sheriff was entitled to fees on the whole debt.

Abuses introduced thereby.

How remedied by 3 G. 1. c. 15; whereby poundage is only to be taken for the sum really due, and marked on writ: Penalty for taking more,

and remedy to party.

29 Eliz. does not extend to the crown;

(a) This only intends execution founded on judgments given in those courts where both judgment and execution are within a limited jurisdiction; but where the judgment is in *Westminster Hall*, though the execution be in a *city or town corporate*, fees are allowed, and the bailiff of the liberty, not the sheriff of the county, is entitled to them. Salk. 331. Dalt. 527. Latch. 19. 52.

So

not formerly to
actions on bail
bonds in re-
venue cases.

brought in the Exchequer by the sheriffs of London, upon a bail bond taken by them in their own names, for the appearance of a defendant taken up upon an Exchequer process on the prosecution of the king's attorney-general on behalf of the crown, for custom-house penalties and forfeitures, and a *testatum capias ad satisfaciendum* to the sheriff of Hertfordshire against the bail, could not be considered as the suit of the crown, though averred to be for the benefit, and on the behalf, and at the expence of the crown, but that the sheriff who executed it was entitled to his poundage. *Lake v. Turner*, Blac. 1983.

But by 7 Geo. 3.
c. 29. it was
extended to
such cases.

Soon after this decision, poundage in such cases was expressly taken away by statute 7 Geo. 3. c. 39. ; which enacts, "That the act of 29 Eliz. c. 4. shall not extend to allow any sheriff, &c. any poundage for taking the body of any person in execution upon any process at the suit of any sheriff, or other officer or minister of the crown, upon any bail-bond entered into for the appearance of any person prosecuted, either for any duties due or payable to his majesty, his heirs or successors, or for any penalty inflicted by any act of parliament, made or to be made, for the preventing the clandestine running or receiving any customable or prohibited goods; or in any case whatsoever, where the sheriff or officer executing such process would not be entitled to poundage, if the proceedings were or had been carried on directly in the name of the crown."

The above are the different statutes by which the fees of sheriffs are regulated; the chief of which, as relating to personal actions, is the 29th Eliz.

Upon this statute an action will lie against the sheriff, if he or his officer take more than is allowed. *Woodgate v. Knatchbull*, 2 D. & E. 158.

By the act, it appears clearly to have been the intention of the legislature that the sheriff should be paid in proportion to the sum levied, and that the sheriff should only levy what is really due.

In actions on simple contracts, and judgments for a debt certain, the expences of levying must be paid by the plaintiff, and not by the defendant. If, therefore, the judgment be for 200 l. the sheriff is at liberty to raise that sum, and no more, and the expences of levying must be paid out of the debt. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expences of the execution; and in those cases, the defendant is the party injured, by the sheriff's taking more than he ought. *Ibid.*

In strictness of law, the sheriff is not entitled to take any more than what is allowed by the statute.

It is his duty to obey the orders of the court, to seize and sell the goods immediately; he cannot be allowed the expence

The chief of
the above
statutes are
29 Eliz.

Action lies
thereon against
sheriff.

Construction
thereof.

How expences
of levy to be
paid;

in common
actions;

in actions for
penalties.

Sheriff only
entitled to
poundage.

No allowance
for auctions, &c.

pence of an auctioneer, or even the levy-fee of a guinea (a); but the sheriff and the court are bound by the act of parliament.

If the plaintiff choose to have an auction, he must defray the expence out of his own debt to be levied; there is no colour to charge the defendant with it: the sheriff can only levy on the defendant that sum which is given by the judgment of the court; and if the defendant wish to have an auction, he must pay for it out of his pocket; it should make no part of the sheriff's account. *Woodgate v. Knatchbull*, 2 D & E. 157.

If, therefore, it appears by the sheriff's return of a writ of execution that greater fees have been taken by the levy than are allowed by the statute, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. *Ibid.*

An action on the case is for this purpose the proper action. *King v. Marsack*, 6 D. & E. 771.

Or an action of debt may be brought by any common informer against the officer guilty of the extortion for the 40*l.* penalty. *Savage v. Smith*, Blac. 1101.

The statute should be accurately set out, at least so much as is stated. When the declaration stated it, lands, goods, and chattels, instead of *or* chattels, it was held a fatal variance in arrest of judgment. *King v. Marsack*, 6 D. & E. 771.

In this action if the plaintiff sets out the judgment on which the writ was founded, he must also prove it. *Qu.* Whether it is necessary to be set out? *Ibid.* 1104.

When the party grieved recovers treble damages in this action, he is also entitled to his costs. *Tyte v. Glode*, 7 D. & E. 267.

If a sheriff levy under a *feri facias*, he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods, notwithstanding the words of the statute are allowing poundage on the sum, which the sheriff levies or extends and delivers in execution: and if after such a compromise either party rule the sheriff to return the writ, the court will discharge that rule with costs, to be paid by the party obtaining it. *Alchin v. Well*, 5 D. & E. 470.

An under-sheriff cannot refuse to execute process till he has his fees; if he does, the plaintiff may bring an action against him for not doing his duty, or may pay him his fees, and then indict him for extortion; but the court will not relieve on motion. *Hefcott's case*, Salk. 331. S. P. 330. 332.

The sheriff may maintain an action for his fees, for the law admitting him to take it, makes it a duty. *Ld. Raym.* 1212. *Brockwell v. Lock*, Salk. 331.

(a) It seems to have been for a long time the practice to take this fee. Blac. 1102.

How auction expences to be paid.

Sheriff liable to action, if it appears by return of writ that too much has been taken by him;

or to a *qui tam* action.

Though parties compromise, sheriff entitled to poundage if he levies under *feri facias*.

Sheriff cannot insist on his fees before execution.

Action lies for sheriff's fees.

(I) (I) Of superseding Execution by Writ of Error, or otherwise.

Allowance of error, *superfedeas*;

use of service thereof.

When bail in error (if required) must be put in.

The *allowance* of a writ of error is of itself a *superfedeas* to an execution, without any notice. *Jaques v. Nixon*, 1 D. & E. 280.

The *service* of the allowance is only material to bring the party into contempt, if he proceeds to sue out execution afterwards. *Ibid.* *Hannot v. Farettés*, Bar. 376.

But although it is an immediate *superfedeas*, yet if it be a case where bail in error is required, such bail must be put in within four days after the allowance, or plaintiff may take out execution.

This is upon the supposition that the allowance of the writ of error is not served till final judgment be actually signed; for there is no opportunity of putting in bail before judgment is signed. *Ibid.*

But it frequently happens, that a writ of error is sued out, and the allowance served before judgment is signed, lest execution should issue instantly. This makes no difference, for it only operates as an allowance from the time of signing judgment. *Ibid.*

So that where a writ of error was sued out and allowed on the 31st May, and on the same day a copy of the allowance was served on the plaintiff's attorney, and final judgment was signed on the 14th June, and execution sued out on the same day, within four days after which bail in error was put in; it was held well, and a *superfedeas* to the execution, which was therefore set aside. *Ibid.*

And the court have gone so far in support of the practice of suing out the writ of error before judgment, that if a writ of error is sued out, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set the execution aside. *Ibid.* *Aird v. Eastmead*, Bar. 260.

If therefore the writ of error be allowed after judgment actually signed, and bail in error be required, such bail must be put in within four days from the allowance; but if it be allowed before judgment signed, then bail must be put in within four days after the signing of the judgment; for the writ of error, though allowed before, can have no effect till the judgment is actually signed; nor can bail, till then, justify. *Doe v. Bracebridge*, 1 D. & E. 280. n.

If a party, after the allowance of a writ of error, and before the expiration of the four days for putting in bail, takes

out execution, he does it at his peril; for if the writ of error be regularly followed up, the execution will be set aside; but if no bail be put in, the execution will stand, and the writ of error will become an absolute nullity. *Lane v. Bacchus*, 2 D. & E. 44.

If a writ of error be not returned and signed by the chief justice, it becomes ineffectual by his death; but execution cannot be taken out without leave of the court. *Cramborne v. Quennel*, Bar. 201. *Olorenshaw v. Stanyforth*; *Hayes v. Thornton*, Ibid.

Writ of error must be returned and signed by chief justice.

The general practice used to be, that if the writ of error was returnable the same term of which judgment was, that it operated as a *superfedeas*, although judgment might be signed in the following vacation, as it would still be a judgment of the precedent term; but if the judgment was not signed till the subsequent term, and was therefore of a different term from the writ of error, that then the writ was deemed spent, and execution might issue. So that a plaintiff, when a writ of error was sued out, had only to wait till such subsequent term before he signed judgment, and by that means render the writ of error of no avail. *Warwick v. Figg*, Bar. 196. *Cook v. Horrock*, Ibid. 197. *White v. Morgan*, Ibid. 198.

Former practice as to writ of error being *superfedeas* when sued out before judgment, and judgment not signed till subsequent term.

But this was a practice not to be encouraged; and the court will now set aside such execution. 1 D. & E. 280.

But now disallowed.

Joint action against several defendants—damages 20*l.* against four of them on trial, and 5*s.* against one defendant who had let judgment go by default; writ of error brought by the four in the name of the one who was not obliged to find bail, because it was by default; and on motion for leave to take out execution against the four notwithstanding such writ of error, the rule was made absolute on affidavit of service. *Mason v. Symmonds and others*, Bar. 202.

In what cases writ of error will or will not operate as a *superfedeas*.

Where a *ca. sa.* is returnable against the principal on a particular day, before which a writ of error is allowed and served, that operates as a *superfedeas* to any proceeding against the bail, though the *ca. sa.* has lain four days in the office before the allowance of the writ of error. *Perry v. Campbell*, 3 D. & E. 390.

Allowance of a writ of error on a judgment by *nil dicit* is so entirely a *superfedeas* to a subsequent writ of execution, and all proceedings against the bail as well as against the principal, that all may be set aside upon motion. *Dudley v. Stokes*, Blac. 1183.

If plaintiff recover a judgment against two defendants in B. R., and one of them bring a writ of error in *Cam. Scacc.* the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of B. R. notwithstanding

standing

standing the writ of error might have been quashed immediately, because not brought by both defendants. In such a case, where the judgment was affirmed in *Cam. Scacc.* and costs given of the writ of error, and both the defendants were taken under a writ of execution on the whole sum, including the costs of the writ of error as well as the original sum recovered, the court permitted the plaintiff to amend his writ of execution as to the defendant who did not join in the writ of error, by deducting the costs thereof, and altering it to the original sum recovered. *Laroche v. Washbrough*, 2 D. & E. 737.

How, if it appear that it was only brought for delay;

The court of C. B. laid it down as a general rule, that they will in no case stay proceedings or set aside an execution on account of a writ of error being brought on a judgment of nonsuit, which evidently must be for the purpose of delay and vexation. *Bow v. Bennett*, 1 H. Bl. 432.

So in *Kempland v. Macaulay*, 4 D. & E. 436. in K. B. But the latter court have since determined otherwise in *Levett v. Perry*, 5 D. & E. 669. and declared, that the practice not to stay proceedings pending a writ of error must be confined to those cases where the party himself, his attorney, or bail declare, that the writ of error is only brought for delay.

Indeed both courts have determined, that where it manifestly appears that the writ of error is brought for delay, they will not stay proceedings in any action on the judgment, nor set aside any execution that may have issued, even since the allowance of such writ of error. *Entwistle v. Shepherd*, 2 D. & E. 78.; *Carter v. Roberts*; *Butt v. Mow*, *Ibid.* n. in B. R.; and *Mitchell v. Wheeler*, 2 C. B. T. R. 30.; and *Goodin v. Hammond*, *Ibid.* in C. B.

But this should appear from the confession of the parties themselves, or the admission of the attorney of the party. *Pool v. Charnock*, 3 D. & E. 79. *Mitchell and Wheeler*, 2 H. Bl. 30.

Though expressions equivalent to such declaration have been held sufficient; *Masterman v. Grant*, 5 D. & E. 715.; but now a mere offer by the plaintiff to the defendant's attorney to wave the judgment if he would point out any error which was refused, was held not sufficient cause to stay proceedings, though plaintiff swore that the writ of error was brought for delay. *Christie v. Richardson*, 3 D. & E. 78.

Nor is it sufficient because the defendant suffered the judgment to be affirmed in the Exchequer Chamber without any objection; for *non constat*, but that there may be error on the record, and litigated in the House of Lords. *Harrison v. Grote*, 6 D. & E. 400.

But

But in all these questions the court will exercise their discretion, as they must depend upon their own circumstances.

So if a writ of error be sued out against *good faith*; as where the defendant's attorney had undertaken that the debt should be paid if the plaintiff's attorney would give time, which the latter had agreed to, provided *no delay* was intended by the other side; and after this agreement defendant brought a writ of error. Though execution be taken out after the allowance thereof, court will not set such execution aside; but as the writ of error is strictly a superedeas, the plaintiff ought regularly to move to quash it. *Oates v. West*, 2 D. & E. 183.

or if brought against good faith.

If a writ of execution is delivered to the sheriff, and the defendant becomes a bankrupt before it is executed, the execution is thereby superseded, and the goods not bound by the delivery; for the property ceases to be in the bankrupt from the time of the act of bankruptcy committed. *Ld. Ray. 252. Smallcomb v. Gros and another.*

In what case bankruptcy of defendant operates as a superedeas.

But *trespass* will not lie by the assignees of a bankrupt against a sheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell. *Smith v. Miller*, 1 D. & E. 475.

An execution against the *goods* of a bankrupt taken out after his certificate is signed by the creditors, and before it is allowed by the chancellor, for a debt existing previous to the bankruptcy, is valid; for the statute 5 Geo. 2. c. 30. extends only to executions against the *person* of the bankrupt.

(K) Of entering Satisfaction on the Roll.

Such are the methods which the law has pointed out for the execution of judgments in personal actions; and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by any compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harassed a second time on the same account.

In B. R.

The party, or his attorney, making satisfaction, should demand of the party satisfied, a

In C. B.

When a judgment is satisfied in vacation time, the plaintiff should execute a warrant of at-

How to be
entered.

warrant or authority, directed to some attorney of the same court wherein the judgment is recovered, authorising such attorney to enter up satisfaction upon the roll, which may be made out in the following form, on a slip of paper or parchment :

Trinity term, 34 Geo. 3.

How in C. B.
in vacation.

Middlesex, ss. Satisfaction is acknowledged between A. B. plaintiff, and C. D. defendant, in a plea of debt for 100l. and 63s. costs.

Judgment entered of Hilary term, 34 Geo. 3. Roll. 492.

T. S. attorney for the plaintiff,
15th June 1794.

Form of entry.

This satisfaction-piece must be taken to the clerk of the judgments, and he will make an entry thereof in his book of remembrances, and deliver the same over to the clerk of the treasury, who will enter the same on the roll, for which is paid in term 3s., in vacation something more.

The entry is to the following effect :

Afterwards, to wit, [on some return-day in the term; if by original, on a general return-day; if by bill, on a day certain,] in the twentieth year of the reign of our Sovereign Lord George the Third, now king of Great Britain, &c. at Westminster, cometh the aforesaid A. B. by his attorney aforesaid, [or by I. M. his attorney, in this behalf,] and acknowledgeth himself to be satisfied by the said C. D. of the debt and damages, costs and charges aforesaid, &c.

How to be
entered in C. B.
in term time.

torney to two attorneys of the court, or either of them, or to any other attorney of the same court, authorising such attorney to acknowledge such satisfaction on record. Application must then be made to the clerk of the judgments, who will prepare a fiat, and attend with the attorney before a judge of the court, and get it signed; and then the clerk of the judgments will enter the same at the foot of the judgment, for which he will take 11. 7s. 8d. which includes all the fees. But if the judgment is above ten years standing, he will take 5s. more, as an extra fee due to the clerk of the treasury.

The entry in this court is as follows :

Afterwards, that is to say, on the _____ day of _____ in the _____ year of the reign of George the Third, now king of Great Britain, &c. cometh the said [plaintiff] by A. B. his attorney, constituted by special warrant to him in that behalf directed, before one of the justices of his majesty's court of the Bench, at his chambers in Serjeant's Inn, Chancery-lane, London, and acknowledgeth that he is satisfied of the debt and damages aforesaid; therefore let the said (defendant) of the debt and damages aforesaid, be acquitted, &c.

If satisfaction is acknowledged in term time, you apply to the clerk of the treasury, who will carry the roll into court, and the secondary will enter satisfaction thereon, for which you pay 1s. per cent. for the poor's box, 2s. to the prothonotary, and 1s. to the secondary.

THUS

THUS have we endeavoured to trace, step by step, the various proceedings in a suit, from its commencement to its conclusion, in all common *personal* actions where the parties are not entitled to any privilege, to which alone this volume relates.

Although it cannot but be acknowledged that, from the formalities and niceties of the practice, delay is sometimes perhaps unnecessarily occasioned in the conduct of a suit, and thereby a degree of inconvenience results to the injured party; yet all who take a full and comprehensive view of the subject must agree, with the learned and elegant commentator on our laws, that “ This care and circumspection in ^{3 Blac. Com. 423.} the law,—in providing no man’s right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not by receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question, either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake, or surprise; and in finally enforcing the judgment, when nothing can be alleged to impeach it; this anxiety, to maintain and restore to every individual the enjoyment of his civil rights, without intrenching upon those of any other individual in the nation, this parental solicitude, which pervades our whole legal constitution, is the genuine offspring of that spirit of equal liberty which is the singular felicity of Englishmen.”

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1. The first part of the report deals with the general situation of the country and the position of the various groups of the population. It is a very good example of a general survey of a country and its people.

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